

Recognizing the Un-Recognized:

Inter-Country Cases and Muslim Marriages & Divorces in Britain

A policy research by Women Living Under Muslim Laws

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What is WLUML?

Women Living Under Muslim Laws is an international solidarity network that provides information, support and a collective space for women whose lives are shaped, conditioned or governed by laws and customs said to derive from Islam.

For more than two decades WLUML has linked individual women and organisations. It now extends to more than 70 countries ranging from South Africa to Uzbekistan, Senegal to Indonesia and Brazil to France. It links:

- women living in countries or states where Islam is the state religion, secular states with Muslim majorities as well as those from Muslim communities governed by minority religious laws;
- women in secular states where political groups are demanding religious laws;
- women in migrant Muslim communities in Europe, the Americas, and around the world;
- non-Muslim women who may have Muslim laws applied to them directly or through their children;
- women born into Muslim communities/families who are automatically categorized as Muslim but may not define themselves as such, either because they are not believers or because they choose not to identify themselves in religious terms, preferring to prioritise other aspects of their identity such as political ideology, profession, sexual orientation or others.

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0.1 Background and Aims

One of the activities of the international solidarity network, Women Living Under Muslim Laws is to provide advice and support to individual women seeking to make autonomous choices. Very often these are women in crisis, facing major questions about their marriage.

WLUML networking organizations such as Shirkat Gah Women's Resource Centre in Pakistan (SG) and Ain-o-Salish Kendra in Bangladesh (ASK) have long offered legal services to such women, and since its move to London in 2000, the WLUML international coordination office (ICO) has been regularly approached for assistance by individual women and support groups in Britain. Networking organizations have worked with British High Commissions (BHC) and the Foreign & Commonwealth Office's Community Liaison Unit (FMU)¹ on numerous inter-country cases. These are cases where the cause and action in a problem situation cover more than one country and legal system. They have included forced marriages, domestic violence, child abduction, abandoned wives and wives in polygamous marriages, custody disputes, and honour crimes, all frequently involving questions about the status of a woman's marriage and/or divorce.

From this extensive experience, it became clear that tens of thousands of Muslims in Britain as well as non-British spouses of British Muslims may be in marriages or undergo divorces whose legal validity is doubtful in the eyes of the English courts and authorities such as immigration and pensions services. This leaves them in a 'married/un-married' limbo, often referred to in legal terms as 'limping marriages', which the 1970 Hague Convention on Recognition of Legal Separations and Divorces (to which Britain is a signatory) explicitly sought to remedy. (While our focus is Muslim marriages, it must be noted that non-Muslims also face issues arising out of inter-country cases, conflicts of laws and 'limping marriages'.)

All too often, the women themselves, lawyers in Britain as well as abroad, community and support groups, social services, the police, the Home and Foreign Offices, etc., are unable to unravel the situation, leaving the status of the women concerned subject to question for many years. Since women are generally more vulnerable in situations of legal ambiguity, many face immense difficulty in accessing their rights.

In sum, the law and what it requires of people in order to have a valid status is clear neither to Muslims in Britain and abroad nor to practitioners and commentators.²

The women include dual nationals (largely with Bangladesh and Pakistan)³ as well as mono-nationals of South Asian countries and Britain, habitual residents or those domiciled in Britain and even those spouses who remain in South Asia who come into contact with the system by virtue of their marriage to spouses who reside in Britain. The commonality is that they are governed by codified or uncodified Muslim laws and customary practices that potentially conflict with aspects of British law. In technical terms, this is a question of Private International Law.

On the whole, family law as it is interpreted and applied in Britain today in effect shunts British South Asian Muslims (and other Muslim communities) out of the legal system rather than including them in the system in a positive manner.

WLUML therefore decided to conduct a policy research project with the goal of addressing the violations of human rights being suffered by women in Muslim communities in Britain and South Asia in connection with the recognition of Muslim marriages and divorces in Britain. We believe this to be the first in-depth study of the issue to combine sociological, legal and political analysis.

The project outcomes are the:

- Identification of the basic issues involved, including the primary legal confusions and social problems;
- Identification of policy changes and recommendations for action that could facilitate women's access to their rights in cases regarding the recognition of Muslim marriages and divorces.
- While the project outcomes are largely focused on majority Muslim communities from South Asia (Bangladesh, India and Pakistan), the outcomes may to some extent be extrapolated to other Muslim communities in Britain.

0.2 Research Methodology

The report is based upon four main approaches:

- **A review of existing documentation**, including: case law reflecting how such cases have been dealt with by the English courts⁴ and other tribunals (eg, immigration); Law Commission reports from British jurisdictions; expert opinions submitted to courts in England & Wales and Scotland; the treatment of Jewish, Hindu and Sikh marriages and divorces; initiatives in other countries facing similar questions (eg, Canada and South Africa); studies on multiculturalism and Muslim laws in Britain; and Muslim political groups in Britain.
- **Discussions with women directly affected and case workers** in order to establish the social and human impact of the current situation and build a body of real-life examples.
- **Discussions with UK-based key informants**, including women's support groups and legal services organizations, lawyers, family court judges, academics, Registry Offices, staff from UK Visas, and members of Shariah councils.
- **Discussions with key-informants abroad**, including women's support groups and legal services organizations, BHC staff in Dhaka, New Delhi and Islamabad.⁵

Please see Annexe 1 for a bibliography/list of materials consulted. This was in addition to existing documentation and records of related issues as well as case studies held by WLUML and networking organizations. Working in collaboration with ASK, SG, an Indian researcher working with Newham Asian Women's Project (London) and the FMU, WLUML spoke with around 40 key informants. Please see Annexe 2 for a list of key-informants.

Where information has been taken from secondary sources, we have cited the source. Where no citation is given, the information arises from our own research.

0.3 Contributing to Dialogue

Instead of an exhaustive academic exercise, our aim was to flesh out and concretize WLUML's existing understandings based on its extensive experience as well as produce a report which could feed into a process of dialogue within communities and policy-makers, as well as support groups, legal professionals and all officials whose work deals with the issues, and between all these groups. Although technical in places, we hope the report primarily shows how the current situation has affected people's lives and convinces all involved that the dialogue needs to be kept within a rights-based perspective rather than playing upon buzzwords such as multiculturalism, identity, culture, and integration.

Produced on the basis of twelve week's intensive work spread over 2004-2005, this report does not claim to be definitive. Particularly in the area of sociological analysis and discussion of community attitudes it can only provide a snapshot of the current situation. Clearly knowledge and analysis of this issue will continue to develop.

The views expressed here are the authors' own and do not necessarily reflect the views of WLUML or the organisations linked through the network.

Endnotes

- ¹ Established in 2000, the CLU is now a joint FCO and Home Office Forced Marriages Unit.
- ² Poulter (1990: 43) points out certain confusions and controversies. Carroll (1997: 106-107) admits making certain assertions about the interaction of English and Pakistan law on judicial divorce purely on the basis of conversations and communications with members of the superior judiciary in Pakistan.
- ³ This study focuses on Muslim citizens of the two countries although it must be remembered that they also have many Hindu and Christian citizens who may have migrated to Britain. Their family laws are not extraterritorial.
- ⁴ Wherever the terms 'English law' or 'England' are used, for the sake of brevity it is assumed to include Welsh law and Wales.
- ⁵ Discussions with BHC staff in Islamabad were part of on-going interaction regarding legal support cases.

1.1 Who is Affected?

Who is Involved?

British nationals of Muslim background or chosen Muslim identity;

- Those born in the UK of South Asian Muslim descent;
- Citizens of Bangladesh, India and Pakistan married to/fiancées of British nationals of Muslim background;
- Citizens of Bangladesh, India and Pakistan domiciled or habitually resident in Britain;
- Women's support groups, shelters, domestic violence advocates;
- Social services;
- Legal service providers and advice groups;
- Solicitors, lawyers;
- Family courts and appeal courts;
- Expert witnesses, academics;
- UK Visas, British High Commission Consular staff/Entry Clearance Officers;
- Registry Offices;
- Immigration tribunals;
- Police;
- Pensions authorities.

The relevant laws which govern marriage and divorce among Muslim citizens of Bangladesh and Pakistan are extraterritorial laws. This means they apply to all Muslim citizens no matter where they reside or whether they hold another nationality.⁶ Thus nationals of these countries who are habitual residents of Britain, specifically those who have acquired a domicile of choice in Britain but retained mono-nationality, are affected as well as those who are dual nationals.

Nationals of both Bangladesh and Pakistan may have dual citizenship with Britain. Anyone born abroad to a Bangladesh or Pakistani national or to someone who has citizenship through descent is entitled to citizenship of Bangladesh or Pakistan. There is no generational limit and thus even a 4th generation British citizen of migrant background may claim/or acquire citizenship of Bangladesh or Pakistan on the basis of just one ancestor's origins.

The operation of the Indian Citizenship (Amendment) Act, 2003 which would have created the possibility of dual nationality under the 'Overseas Indian Citizenship' scheme was suspended in January 2005. Take up was expected to be high among British Indians.

1.2 The Problems Identified

Our research identified over a dozen major problems associated with the recognition of Muslim marriages and divorces by the British legal system. These cover a range of fields from the legal to the social to the political.

The overarching problems in cases involving recognition of Muslim marriage and/or divorce are:

- The lack of knowledge regarding the law on the part of all actors;
- The lack of clarity in the law;
- The failure of the British legal system to respond to needs;
- Mutual mistrust between the British legal system and Muslim communities subject to that system.

Our research uncovered examples of people facing 'limping marriages' or uncertain marital status in the eyes of the state even when every effort had been made by the couple to 'get it right'; or when events that had occurred decades before and which had not been challenged by the parties involved were subsequently challenged by the British authorities.

This Section is intended as a alternative to an Executive Summary, and a more detailed examination of the policies and laws behind them follow in Sections 3 and 4 respectively. The human impact of this situation is discussed in Section 2.

Problem No. 1: Confusion over what marriages the courts will recognize

Questions arise over what constitutes a recognizable marriage because of:

- a) How and where the marriage was conducted; and/or
- b) Whether or not it is 'polygamous';
- c) The domicile of the parties.

The large number of reports produced by the Law Commissions in England, Scotland and Wales (see Annexe 4) indicate that foreign marriages and divorces are a matter that has raised major debate within the British legal system and about which legal professionals and law-makers are often themselves uncertain.

a) Many women in Muslim communities in Britain believe (and men who know better can benefit by failing to correct their error) that a marriage in a mosque or before *imams* in Britain constitutes a valid marriage. In the event of a dispute and an attempt to enforce their rights through the British courts, they are shocked to discover that, unless married in one of the very few mosques registered as places for civil ceremony, they are not validly married in the eyes of British law.

Anecdotal evidence indicates that the problem partly arises because of a common misperception throughout Britain that 'common law marriage' has in effect the same value as a Registry Office marriage. This may be reinforced by for example benefit and tax forms that ask whether a person is married or has 'a partner' (defined as "a person you live with as if you are married to them.") Recent media coverage (often sensationalist) about 'gay marriage' and changes in British law regarding civil partnerships may have also combined with disdain within the Muslim community for Britain's apparent recognition of alternative families to lead to a thought process which states "Well, if they can recognize all these gays as married, why not a Muslim *nikah* [marriage]?" This is to be added to the fact that there is indeed a concept of common law marriage in Muslim laws.⁷

Conversely, many women from Muslim communities in Britain and from South Asia erroneously presume that a marriage conducted abroad under foreign laws is somehow not 'fully valid' in the eyes of British law. The FMU has had several cases where girls forced into marriage abroad have, in a fit of extreme wishful thinking, presumed their marriage is invalid and begun the process of remarrying once safely returned to Britain. While technically correct in that duress renders a marriage under the Muslim family laws as applied in Bangladesh, India and Pakistan void, the first marriage is regarded as valid under both British law and the Muslim family laws of those three countries until annulled or dissolved.

A final mistake is the presumption that a British civil marriage and/or divorce is not recognized under South Asian laws (for example, Shah-Kazemi, 2001: 45). There is no known case where the validity of a British Registry marriage has been challenged in the Bangladesh or Pakistan courts and legal practice presumes a British civil divorce to be valid under local law. Cases coming before Bangladesh and Pakistan courts involving a British civil divorce invariably involve custody and property disputes, and neither party challenges the actual fact of divorce.⁸

These confusions are shared by British authorities such as the police, by support services and even lawyers.

Additional complications and confusions arise from certain customary practices or inappropriate advice given to transnational couples. For example, it is a known practice for couples to marry in Pakistan but apply for the non-British spouse's entry to Britain under a fiancé(e) visa or even student visa. There may ultimately be a delay of several years and even a child born before a Registry marriage takes place, creating confusion as to whether the couple is or is not married and which date of marriage to apply in the event of disputes.⁹

b) Today's confusion regarding the recognition of Muslim marriages solemnized other than as a civil marriage in Britain (eg, a *nikah* conducted in Pakistan) is partly because there has been such a long debate in British law (today largely settled - for details, see Section 4.1.4) about such marriages. The central issue in this has been the character of the marriage - whether it is polygamous or monogamous. For many years British law confused the matter

by regarding marriages contracted under a system that permits polygamy as 'polygamous' – even if the couple had lived monogamously for 20 years. The matter was further confused with the use of the sub-category 'potentially polygamous' (for de facto monogamous marriages) in case law. For many years any 'polygamous' marriage was denied matrimonial relief by the English courts (even if it was regarded as valid for example for tax and legitimacy purposes).

Although a British domiciled person's marriage abroad under a system which permits polygamy is now valid, for the spouses to be able to seek matrimonial relief in the British courts or bring the other spouse to Britain, it must be monogamous in practice.

But the situation is not quite so clear-cut. For example, polygamous wives whose British resident husband dies have found the British authorities are uncertain as to what to do regarding the sharing of his pension between them (see Section 2 case study). There appears to be uncertainty about whether another wife can be brought into Britain as the 'sole' wife following the death or divorce of the British resident wife in a polygamous marriage.

c) Several matters relating to recognition of Muslim marriage and divorce have been closely connected with the question of whether is a person considered to have acquired a domicile of choice in Britain or to have abandoned their domicile of origin.¹⁰

The British rules of domicile have been among the most difficult in the world to grasp. Norway, for example, which has a very substantial Pakistani migrant population, has the far simpler system of determining which laws apply by looking at nationality and/or residence, both of which are relatively easy to document and substantiate. Domicile, on the other hand, is more a question of intent and even 'allegiance'. While material factors such as a person's actions (numbers of visits, statements about intended place of retirement, etc. and property ownership are necessary evidence of domicile, in court they are not sufficient evidence.

Over twenty years ago, the Commission for Racial Equality noted that domicile 'an abstract concept of legal art' was not generally understood (Shah, 2002, quoting Law Commission, 1982, No.83: 47-48). The 1987 Law Commission Report No. 168, ***Private International Law: The Law of Domicile*** also pointed out the complications regarding the question of domicile in inter-country cases and called for reform in the form of a proposed Domicile Act 1987 (which was not enacted).

A 2005 House of Lords ruling appears in effect to have redefined and relaxed domicile rules, at least in terms of accepting jurisdiction for couples who are not British nationals and married abroad. British law has now accepted the fact of transnationalism and the possibility that a person can have more than one 'habitual residence'.¹¹ But it is too early to assess the positive impact of this change on a wide range of inter-country cases, and it does not assist the recognition of foreign divorces.

Problem No. 2: Confusion over what constitutes a valid divorce

If a couple have only married through a *nikah* conducted in Britain, since in the first place their marriage is not valid in the eyes of British law, the validity of their divorce in British law simply does not arise. Women in such situations may be denied their financial rights from the marriage, specifically maintenance and inheritance. With no recourse to formal law, they are at the mercy of family members and social systems which in practice do not always uphold women's rights. It is precisely these factors which have led women's movements across the Muslim world – in South Asia, the Middle East, South-East Asia and Africa – to demand the registration of marriage and divorce. In many countries, including Bangladesh and Pakistan, these provisions have been in place for decades, making British Muslim women's situation far less advanced.

There are no statistical details but it is presumed that the majority of Muslim couples in Britain were either married through a Registry Office in addition to a *nikah*, or a *nikah* performed abroad. There is then considerable confusion as to how to dissolve such unions.

As mentioned above, a civil divorce in Britain whether of a valid *nikah* performed abroad or of a Registry marriage in Britain involving Muslims, is possible and valid and is generally recognized by for example the Pakistan courts.

Problems arise when supposedly 'Islamic'¹² forms of divorce are used to dissolve a marriage that is valid under British law. Specifically problematic is the question of the validity of *talaq* - the unilateral termination of marriage by the husband or by the wife when she has been delegated this right in her marriage contract. The validity of such a Muslim divorce depends upon complex questions of where it was pronounced and where the procedure was completed; the nationalities, domicile and habitual residences of both the spouses; and what form of dissolution was used and before which forum (see Section 4 for details).

Added to the legal complexities is the fact that a 'triple *talaq*' [three oral pronouncements of divorce] is customarily the most common form of divorce by men in South Asian Muslim communities. There is a widespread presumption that *talaq* operates as an irrevocable and instantaneous termination of the marriage but this does not match the provisions of the Muslim Family Laws Ordinance, 1961 (MFLO) (see Section 4.2 below).

Overseas divorces are practised by men largely because they are misinformed or seek to deceive their wives that the British courts will thereby have no jurisdiction over the remaining matters such as custody of children, division of property or any other financial relief. (These issues remain outside the scope of this study.)

In the confusion created by these complexities serious problems arise if one or more of the spouses are subject to two different legal systems, one of which recognizes the divorce while the other does not (see Problem No. 5 Conflicts of Law).

Clearly, if someone is not properly divorced then the validity of any subsequent remarriage will be in doubt. Despite perceptions among non-Muslims in Britain, divorce and the subsequent remarriage of both parties is in fact not at all uncommon among Muslims, and the validity of a remarriage following divorce is one of the most common issues facing Entry Clearance Officers (ECOs) at British High Commissions in South Asia.

Since, the spouses' domiciles and habitual residences specifically determine whether or not a *talaq* is a valid divorce, the prevailing confusion regarding domicile and habitual residence discussed above adds to the situation.

Problem No. 3: Conflicting approaches to validity by different British authorities

Our research found many instances where couples have had their status declared valid by one British authority only to find it rejected – possibly years later – by another. When they marry people who have previously undergone a foreign divorce, Registry Offices in Britain issue a conditional declaration to the effect that while they are granting permission to marry in the present instance, this is no guarantee that this second marriage is valid. The most common dissonance is between Registry Offices on the one hand, and BHCs and immigration tribunals on the other.

Other commentators have noted the need for simpler rules on recognition of foreign divorces because validity often also arises at an administrative rather than judicial level (Carroll, 1989a: 158, quoting Karsten, 1980). Rather than reducing the burden on administrative officials regarding decisions about recognizing foreign divorces, the Family Law Act 1986 has arguably made it greater.

It appears that the practice of couples coming to Britain following a *nikah* in South Asia and marrying again through a Registry marriage may trace its origins to earlier advice from Entry Clearance Officers (Shah, 2002a: 8, quoting Commission for Racial Equality evidence to the Law Commission, 1982).

Problem No. 4: Confusion over nationality

In legal terms, it is not clear how far the MFLO applies to British citizens of Bangladeshi and Pakistani descent who have not concretized their dual citizenship, for example, by claiming a passport or by being registered at birth with the High Commissions. However, the only absolute way to avoid application of the MFLO and MMDRA¹³ if someone is entitled to dual citizenship is to pro-actively renounce citizenship of Bangladesh or Pakistan. Given that this is something of a social impossibility, even implying rejection of a 'Muslim identity', there remain hundreds of thousands of British citizens potentially subject to the provisions of the MFLO and MMDRA and resultant conflicts of law.

Problem No. 5: Conflicts of law

It is common knowledge that British law and Muslim laws conflict regarding polygamy and the rights of wives to inheritance, with British law generally offering women a more favourable situation.¹⁴ There are also presumptions that British law grants women greater rights to a division of marital property and increased chances of child custody in the event of divorce.¹⁵

However, the conflicts of law regarding validity of marriage and divorce are less understood and less clear-cut because of the confusions discussed above. The conflicts are such that a couple may duly follow one system and find that their actions are declared void or not recognized under the other system. Some conflicts are illustrated in the case studies in Section 2.

One area is the dissonance between grounds for divorce. In a hypothetical example a Pakistan-British national woman, seeks a decree of dissolution in the English courts due to irretrievable breakdown caused by her husband's 'adultery' when he has married another woman. Once the English court's decree becomes absolute, she is free to re-marry; there is no statutory waiting period for her before she can contract another marriage. Yet from the perspective of Pakistan law her status clear is not clear. A decree granted on the grounds of such alleged adultery or 'bigamy' by a Muslim husband is not recognized by Pakistan law (as no such provision exists under Pakistan law because polygamy is permitted). Under Pakistan law her previous marriage still subsists and any subsequent marriage contracted by her will be penalized in Pakistan under bigamy and adultery. The closest grounds for dissolution under the Dissolution of Muslim Marriages Act 1939 (DMMA) is that the husband does not treated her equitably in a polygamous marriage, has taken an additional wife in violation of the permission requirements under Sec. 6 MFLO.

In sharp contrast to general perceptions (both within the Muslim community and beyond), a woman can initiate a divorce which can be final (and she therefore be free to remarry) within a substantially shorter period under Muslim family laws than under British law. Using *talaq-e-tafweez* [husband delegates the right of *talaq* to the wife in the marriage contract or by subsequent written agreement], under the MFLO the dissolution could theoretically be effected in a period of 90 days. This form of divorce is now increasingly popular in Bangladesh and historically recognized since the earliest days of Muslim jurisprudence.

A common question facing support services is what happens if woman goes through a *nikah* while her civil divorce proceedings (whether initiated by the wife or the husband) are not yet finalized by the issuing of a decree absolute.

Problem No. 6: Lack of clarity of terms and procedures

British law has tied itself in needless knots in its half-hearted attempt to address the problem of regulating overseas divorces. Since the 1970s there have been several cases which have endlessly debated the meaning of 'other proceedings' (meaning divorces outside the judicial

process but through some other administrative mechanism eg, *talaq* under Sec.7 of the MFLO). The understanding of what this term includes is critical to whether or not a particular form of overseas divorce is valid.

While Sec. 2(a) of the Recognition of Divorces and Legal Separations Act 1971 used the phrase 'judicial or other proceedings', the 1986 Act throughout uses the simple term 'proceedings'. But under Sec. 54(1) these are 'explained' as follows: "'proceedings' means judicial or other proceedings." The first case study in Section 2 illustrates the problems which arise due to lack of clarity regarding 'other proceedings', especially the differential treatment and different outcomes for the people involved even when cases may be very similar (see Section 4.1.8 and endnote 76).

The 1986 Family Law Act spelled out the criteria for recognition and rejection of overseas divorces. Other than these statutory provisions, the only discretionary grounds for rejecting an overseas divorce is 'public policy'. However, this has never been elaborated in concrete terms, although some judgements have provided certain guidelines.¹⁶

At present, there is no single body in England & Wales (nor in Scotland and Northern Ireland) that can coordinate the development of a coherent interpretation and application of law regarding the recognition of Muslim marriage and divorce. This is particularly necessary in the application of the complicated concept of domicile. Thus Registry officials and immigration tribunal officials and consular staff may apply very different understandings of what is or is not a valid marriage.

Meanwhile, the process for registration of a place for marriage under the Marriage Act 1949 in effect excludes many mosques, thereby discouraging the possibility that a far greater number of *nikahs* become validated through the presence of a civil registrar. Some within the community are now campaigning to encourage a greater number of mosques to register themselves.¹⁷

"It seems strange that football stadiums are getting registered as places for marriage but mosques are finding it difficult."

David Pearl, Author, Muslim Family Law (see bibliography)

Problem No. 7: Attitudes of the British legal system to foreign legal systems

“The colonial attitude towards foreign laws and legal systems has to change as it is alienating and excluding people from the system.”

Dr. Martin Lau, Head of the Law Department, School of Oriental and African Studies, University of London.

Case law clearly reflects a contradictory approach by the British legal system towards foreign legal systems. On the one hand, it avoids close examination of certain acts by foreign nationals or conducted under foreign laws and proceeds on the basis of certain (sometimes erroneous) assumptions. On the other hand, once informed of the details it often becomes unreasonably pedantic and obstructive. This fosters a general atmosphere in which disclosure on the part of couples who may have questions regarding the validity of their status is discouraged, storing up potential problems and violations of rights for later.

Similarly, while the scope of jurisdiction is widening,¹⁸ once jurisdiction is accepted the rules are being increasingly narrowly interpreted, perhaps due to the influence of immigration control policies and attitudes.

The historical disdain for any foreign system without regard for the actual content of people’s practices under that system was evident in past cases (the law has since changed) when foreign marriages were seen as invalid merely because they were ‘potentially polygamous’ rather than whether they were factually monogamous (also forgetting the possibility that under Muslim laws the wife may have monogamy written as a condition in the marriage contract).

But such attitudes remain in force. One Lord Justice referring to oral *talaq* stated as recently as 1984: “Pronouncement of *talaq* three times finally terminates the marriage in Kashmir, Dubai, and probably in other unsophisticated peasant, desert or jungle communities which respect classical Muslim religious tradition.”¹⁹ This was re-quoted in a 1999 case.²⁰ While liberals and progressives in Muslim contexts have long struggled against the violations of women’s rights that occur due to unregulated *talaq*, the Lord Justice’s comments do not appear to stem from great concern about people’s rights. Moreover, if the British legal system is aware that in certain jurisdictions there is no codified mechanism for regulation of divorce, how does this square with the fact that the law refuses to recognize overseas divorces which have not been subject to ‘proceedings’? Are individuals to be punished merely because they are from contexts where laws are uncoded?

Even where foreign laws are codified, the British legal system fails to take into account the way that law is applied. The law on recognition of foreign divorces today requires the divorce to be valid in the country in which it was obtained. But all too often this test of validity is applied using a rigid reading of the statute book and overlooking how the Section is actually applied by the foreign legal system (see the first case study in Section 2).

Arguably, the Family Law Act 1986 and its more restrictive criteria for the recognition of divorce through *talaq* was designed to 'protect Muslim women' from the injustices of unregulated repudiation or *talaq*. But the law has failed to prevent men from pronouncing an overseas *talaq* and instead has simply left their former wives in limbo while the men can remarry. Its paternalism and/or preference for conservative interpretations of Muslim laws also overlooks women's agency and the possibility that women may initiate legal divorces outside the courts through *talaq-e-tafweez* or *mubarat* [divorce through mutual agreement].

The British system's inability or unwillingness to accommodate certain alien legal concepts is illustrated by its approach to Muslim marriage contracts (*kabinnama* in Bangladesh and *nikahnama* in Pakistan). To date, these have been generally treated as pre-nuptial agreements. But in Muslim laws these constitute the marriage itself – Muslim marriage being a contract and not a sacrament as under Christian concepts. In other non-Muslim countries, the trend of regarding Muslim marriage contracts as pre-nuptial agreements has not caused as many problems simply because in general all pre-nuptial agreements are regarded as having the force of law. But British law remains almost evenly divided as to the legal enforceability of a pre-nuptial agreement, leaving considerable room for yet more litigation between parties.

Although not a central focus of this study, it is clear that the uncertain status of Muslim marriage contracts negatively affects women's access to certain property rights arising out of Muslim marriage – specifically *mehr* [dower]. The burdensome nature of civil law procedures because of the difficulty of having to formulate a Muslim marriage contract in terms of conventional civil remedies has been noted (Shah-Kazemi, 2001: 72).

Problem No. 8: British system slow to respond to needs

In some of the most famous cases regarding recognition of marriage and divorce, the British courts have repeatedly commented on the urgent need for reform to ensure justice for immigrant families – and to save legal aid funds. Yet the British legal system has been extremely slow to respond.

For example, debate about the term 'other proceedings' has gone on for some 35 years and remains unresolved, while it was only in 1995 after more than 23 years of debate that foreign marriages under systems permitting polygamy were recognized as valid. Six years before the Matrimonial and Family Proceedings Act 1984 (which gave the English courts jurisdiction to grant financial relief after a foreign divorce) came into force, Lord Scarman and Lord Diplock commented on the need for reform.²¹ In another major case in 1995, the court recognized that the law regarding recognition of overseas divorce may be ambiguous and that Parliament was the proper forum to debate whether or not in an increasingly multi-racial and multi-ethnic society the refusal to recognize transnational divorce can or should continue.²²

The failure of reforms to address the evident problems are all the more surprising given that Law Commission Reports have very clearly identified the issues and suggested many useful remedies. A factor behind this gap between debate and law may be that laws have so far reflected policy and largely been determined by immigration policy rather than a consideration of the human problems facing migrant populations. This is despite emphasis both by previous and the present British Government on the importance of the family.

Problem No. 9: Misuse of the conflicting systems to deny the other spouse their rights

The general argument against recognition of Muslim divorces through *talaq* is that *talaq* does not give the wife an opportunity to defend her case and thereby causes injustice. Therefore the British legal system cannot allow husbands to take advantage of their financial position and travel to a country which permits divorces through non-judicial proceedings. But cases show that men have sought to use whichever system strengthened their position. Ironically sometimes this is the English system.

In one famous case in which the husband did not access *talaq* but instead pursued a divorce through the British courts, Justice Cumming-Bruce observed that he was “left with a very strong impression” that the reason why the husband instituted proceedings under English law was not disconnected with the very substantial dower debt [*mahr*] agreed upon in the marriage contract and payable in the event of *talaq*.²³

Manipulation of the conflicts of law and abuse of parallel systems is more frequent by husbands, yet wives have equally used the confusions to punish divorcing husbands through endless litigation. Although divorce is by no means a rarity, social attitudes, particularly in the middle classes, continue to regard divorce as an affront to family honour and women are often desperate to avoid being divorced – even in situations where the relationship is clearly beyond repair. Unable to actually prevent a divorce from eventually happening in both systems, divorces between couples subject to Muslim laws see the kinds of extended litigation over property that are also witnessed in other communities. The confusions discussed above merely add to this unpleasant situation. One such case ran through various stages from 1989 when the husband initiated *talaq* proceedings to 2004 when the Scottish Court of Session announced its decision and was contested in three different countries.²⁴

Problem No. 10: Women’s lack of knowledge of their rights under statutory laws and Muslim laws or face other obstructions to accessing their rights

Support services may be confounded by the apparent contradiction that a young woman is educated and sufficiently autonomous to have left home, married out of choice and take her problem to the police, social services or a support group but was still unable or unwilling to take steps to protect her rights within marriage and ensure she was validly married or validly divorced.

Why women in Muslim communities lack basic legal information about marriage and divorce or are unable to act upon their knowledge requires greater research, which must take into account class and ethnic/cultural diversities as well as the varying facilities and services available to women in different parts of Britain. Homogenizing women's interaction with the law would be a mistake.

However, factors behind women's lack of knowledge of their rights may include the lack of clarity among lawyers and experts regarding recognition of Muslim marriages and divorces under statutory laws; the mistaken presumptions that prevail in Britain within the community and beyond regarding Muslim laws²⁵ (see Problem No. 11); and the lack of structures and mechanisms for sharing information and building capacity. In some solidarity cases, WLUML has found women are extremely eager to understand and protect their rights. Indeed, in the case studies in Section 2 it is clear that women have attempted to obtain appropriate advice and take steps to protect themselves – only to be failed by the system. But in other instances, even apparently independent educated women, for reasons that require sociological examination, are willing to go along with social practices that obstruct access to their rights or even optimistically hope that they can negotiate between the systems to their advantage.

Individual women and Muslim communities in Britain as a whole need to move more rapidly towards examining preventive-protective measures (such as ensuring registration of a marriage and keeping copies of their own marriage documents) which could ensure fewer conflicts of law arise in the first instance.

Although providing women more information in useful forms is vital, it is not just a question of telling women the 'correct procedures according to Shariah' because of the diversity of Muslim laws and statutory provisions across the Muslim world.

Problem No. 11: Lawyers, academic and experts in Britain and abroad confused about aspects of Muslim laws and interaction with British law

"Each solicitor you go to gives you different advice."

Kaveri Sharma, Newham Asian Women's Project, Legal Officer on inter-country cases and recognition of Muslim marriage and divorce in Britain.

The inadequacy of legal advice available in Britain regarding Muslim marriages and divorces is already well-documented. Solicitors – including those of a Muslim background - provide incorrect information, while women have found non-Muslim solicitors unsympathetic as well as racist regarding certain cultural practices such as arranged marriages (Shah-Kazemi, 2001: 53-54).

This inadequacy partly explains why women turn to the informal Shariah councils that operate across the country. For example in one case a British Muslim woman married to a Pakistan citizen in Pakistan wanted a divorce. She was incorrectly advised that she could not get a divorce through the courts in Britain and incorrectly believes that a divorce under Pakistan's laws in Pakistan would not be recognized in Britain (Shah-Kazemi, 2001: 31-32).

However, lawyers in Bangladesh and Pakistan offer little better services. Our research found Bangladesh lawyers and academics completely unaware of conflict of law issues. This is probably because Private International Law is not taught in law schools and because women prefer to pursue cases through the British system because it is perceived to guarantee better rights (especially regarding property matters). At best they are familiar with the content of existing standard writings on recognition of Muslim marriages and divorces, described by a lawyer associated with the legal services organization Ain-o-Salish Kendra as “the new orthodoxy.”

Yet this new orthodoxy is based on a fundamental misperception of Muslim laws. Many academics, who frequently appear as expert witnesses in conflict of law cases, continue to unnecessarily complicate matters by referring to the provisions of ‘Islamic law’ or ‘Shariah’. This overlooks the fact that the couple involved are not subject to some undefined set of religious principles but to concrete provisions of statutory laws in two or more countries. Those who have studied the history of gender and Islam²⁶ will recognize a very Orientalist tendency in such experts to mythologize Muslim laws as homogenous, monolithic, obscure and even scintillatingly unknowable. In the process, and in order to render these apparently extraordinary complications digestible to a non-Muslim audience such as the British courts, new terms such as ‘bare *talaq*’ and ‘full *talaq*’ have been invented. Yet these only serve to further complicate matters and prevent the unravelling of situations in which people’s rights are being violated.

At other times, there is a naive assumption that those with any visible ‘Muslim connection’ somehow automatically have ‘expert’ knowledge regarding the operation of statutory laws in Muslim contexts and the practices of Muslims. In one 2004 case, one of the parties used as an ‘expert witness’ regarding Pakistan law a 78-year old who last practised law in Pakistan in 1960 (before the current MFLO came into being), who was last in Pakistan some 20 to 25 years ago and whose specialization was international economic law. Needless to say, the case was lost.

Problem No. 12: British authorities lack appropriate training

Consular staff at British High Commissions in South Asia routinely face issues regarding the recognition of Muslim marriages and divorces when processing Entry Clearance applications (spousal and fiancé visas) and issuance of first-time passports to those who are entitled to claim British nationality (generally children born abroad to British parents).

In interview, they clearly acknowledged their lack of capacity regarding these issues, the unequal treatment given to consular clients given the absence of a coherent training system, and the frustration they feel at the inadequacies of hand-over processes for rotated staff. One official stated that a decision to reject an application was reversed simply because a more knowledgeable staff member happened to be passing and overheard the conversation.

The structure of the police forces in Britain mean that the knowledge and expertise built up in certain individual officers is not routinely shared with others in similar positions and there is enormous variations in capacity and understanding across the various forces, obstructing the efforts of even the most sympathetic officers.

Meanwhile, taking a cue from the overall multiculturalist policy context (see Section 3), and in the absence of adequate information, support agencies often conflate the legal and social aspects of a case. Familiarity with Muslim communities is frequently limited to knowing the words '*talaq*' and '*imam*', with the presumption that marriages or divorces by any *imam* is somehow valid in British law (as illustrated in a case study in Section 2).

Add to these inadequacies individual bigotry and the institutionalized racism that continues to dominate various aspects of the British system and one finds an operational context in which it is difficult to address violations of women's rights in Muslim communities.

Problem No. 13: Politicization of the issues – questions of identity, multiculturalism and immigration

In the few socio-legal studies that have examined the interaction of British Muslim communities with the British legal system (see bibliography), the human cost of the prevailing situation is often drowned out in the political positioning that inevitably takes place. Indeed, such studies can be flawed in that they only examine the views of an already self-selected group of women – those who have approached the various informal Shariah councils rather than a wider section of women in Muslim communities.

Although multiculturalism does oppress boys and men too (Husan, 2003:122), as feminist theorists have noted, women are often the bearers of a collective identity and their rights become the public battleground between the state and minorities, between and within minorities.

WLUML networkers across the Muslim world have had long experience of finding themselves at odds both with discriminatory majorities and patriarchal forces within minorities. Similarly, addressing the violations of women's rights related to the uncertain status of Muslim marriages and divorces requires changes in British policy towards Muslim communities, especially migrants, as well as changes within the community in terms of addressing regressive cultural practices and interpretations of Islam. But policies of multiculturalism

and towards immigration, and matters of community identity have become highly politicized issues. This obstructs the kinds of practical change that can improve women's access to their rights.

Problem No. 14: Access to justice issues

Existing research acknowledges that women married abroad often face insurmountable difficulties in financing proceedings, providing instructions and evidence, remaining protected during the proceedings and having a decree of nullity recognized and enforced in the country in which they live (Home Office, 2000: 7). Complex legal procedures around divorce are one of the factors cited as reinforcing community expectations that couples should remain together (Samad & Eade, 2002: 42).

Meanwhile, government and non-government support services alike have noted a recent enormous increase in cases of abandoned wives (non-British wives taken back to their 'home countries' and abandoned by husbands resident in Britain). Unravelling such marriages becomes particularly complicated when the wives face difficulty in returning to Britain to lodge any case to gain their economic rights or fight a divorce case or husbands refuse to attend proceedings abroad. Even if relief is obtained abroad, they face difficulties in enforcement.

Endnotes

⁶ There has been no amendment clarifying that these extraterritorial laws do not apply to dual nationals when in the country of their other nationality.

⁷ In contrast to the global publicity that has surrounded cases in Pakistan where couples have been persecuted for *zina* [extra-marital sex] in the event of a marriage of doubtful documented or procedural validity, the courts have in fact been extremely open to accepting as valid the marriages of couples who have clearly long been a 'couple' in terms of living together and having children or being publicly acknowledged as man and wife.

⁸ For complete clarity, it is best for a British divorce certificate to be processed under Sec. 8 of the MFLO and a certificate of dissolution to be thereby obtained (for details regarding Sec. 8 of the MFLO see Section 4.2.1 below).

⁹ The potential confusions arising out of a situation where a couple marry validly under a foreign system and later marry again in a Registry marriage in Britain, were discussed as long ago as in the 1971 Law Commission (42: 34) specifically regarding a Nigerian couple in *Ohochuku v. Ohochuku* [1960] 1 W.L.R. 183.

¹⁰ Since the Domicile and Matrimonial Proceedings Act, 1973, women are no longer automatically presumed to share their husband's domicile.

¹¹ *Mark v. Mark* [2005] UKHL 42

¹² It is necessary to distinguish between what is 'Islamic' ie, the precepts of the religion, and what is 'Muslim', ie, what is practiced by Muslims. WLUML therefore prefers 'Muslim laws' (in the plural to reflect diversity of interpretations) and does not use 'Islamic law'.

¹³ In addition to the MFLO, Bangladesh Muslim marriages are also governed by the Muslim Marriages and Divorces (Registration) Act 1974 which replaced Sec. 5 of the MFLO. The MMDRA is also extraterritorial.

¹⁴ A Muslim husband may gift or will his wife a greater share of inheritance than the specified Qur'anic share but this is rarely practised, especially among South Asian communities.

¹⁵ Unlike Muslim laws in countries such as Tunisia, Egypt, Malaysia and Singapore, Muslim laws as applied in South Asia offer divorced women little rights to the husband's or marital property unless there has been a specific written agreement to this effect during the marriage (WLUML, 2003). On the other hand, custody law in South Asia is dominated by the concept of the welfare of the child and in recent decades the courts have very frequently granted mothers custody extending

traditional interpretations of Muslim laws (WLUML, 2003).

¹⁶Chaudary v. Chaudhary [1984]3 All E.R. 1017

¹⁷<http://news.bbc.co.uk/1/hi/uk/3503741.stm>

¹⁸A June 2005 House of Lords judgement on domicile dramatically expanded the jurisdiction of the British Courts to cover the family disputes of parties who are not even residing legally in Britain (Mark v. Mark [2005] UKHL 42)

¹⁹Cumming-Bruce LJ in Chaudhary v. Chaudhary [1984] 3 All ER 1017 (at 1028j)

²⁰Mirza Waheed Baig v. Entry Clearance Officer , Immigration Appeal Tribunal [2002] UKIAT 04229 Appeal No. TH/05142/2000

²¹Quazi v. Quazi [1979]3 All E.R. 897

²²Berkovits v. Grinberg and Another [1995]2 All E.R. 681 at 696j

²³Ali v. Ali [1966]1 All E.R. 664 (at 671)

²⁴Syed v. Ahmed, [2004] ScotCS 83 (31 March 2004)

²⁵This is especially as regards forms of and grounds for divorce under Muslim laws. Shah-Kazemi (2001: 37) illustrates this.

²⁶For example, see Ahmed, 1993

The case studies in this limited selection are a mixture of case law, cases handled by WLUML, and cases shared by key-informants. Many illustrate how decisions in courts or official tribunals can leave women stuck in limbo – potentially for the rest of their lives.

In all of the cases, the women involved attempted to take the correct steps, only to find that they had been given incorrect advice or that the system was unable to protect their rights.

The Story of Nighat Parveen Bhatti

(case law: *Mirza Waheed Baig v. Entry Clearance Officer Immigration Appeal Tribunal* [2002] UKIAT 04229 Appeal No. TH/05142/2000)

a) The facts

Nighat was a British national woman of Pakistani origin married in 1992 to Arshad Mahmood, a Pakistani man. There appears to have been no *rukhsati* [the bride moving to live with the groom, implying consummation of the marriage] and she returned to Britain. Arshad subsequently divorced her in Pakistan.

In 1999, Nighat married Mirza Baig via a *nikah* and Registry Office marriage in Britain. Mirza immediately returned to Pakistan and applied for entry as a husband. He was refused on the grounds that Nighat was not properly divorced from her first husband and was therefore not free to validly marry Mirza.

The Immigration Appeal Tribunal held that Nighat was still married to Arshad Mahmood and therefore rejected Mirza's appeal.

The entire case revolved around the validity of Nighat's first divorce. Since she was habitually resident in the UK, to be recognized as valid under British law it had to be by means of 'proceedings', and her divorce from Arshad did not qualify as being through 'proceedings'.

Arshad Mahmood had sent Nighat three separate divorce deeds on stamp paper over a period of four months, but never notified the Union Council as required by the MFLO. He never subsequently retracted his actions as invalid.

b) The analysis

Ignorance, poor advice and nervousness in the face of interaction with the British system is clear throughout. The elaborate process used by Arshad to divorce Nighat (which is not standard practice in Pakistan but a half-digested attempt at fulfilling the law) indicates he may have taken advice, as is common, from one of the dozens of untrained 'notaries' who usually sit outside Pakistani courts. Had Arshad simply notified the Union Council of just one of the divorce deeds, the *talaq* would have been recognized by British law. The elaborate process he used indicates he was trying his best to avoid confusion but through ignorance of law ended up creating confusion instead.

Apparently trying to clarify her status Nighat even obtained a letter from a District Judge in Britain who was “satisfied that the Talaq divorce [from Arshad] would be recognized in this country.” Meanwhile, Mirza’s failure to mention his civil marriage with Nighat during the Entry Clearance interview may have been the result of poor advice from immigration ‘experts’ who prey upon nervous applicants. And Nighat’s contradictory entry of her status as ‘divorced teacher’ in her *nikahnama* and ‘spinster’ in the Registry Office records is probably similarly out of poor advice or nervousness about disclosure. The irony in this case is that if Nighat and Mirza Baig had married in Pakistan and never disclosed her previous marriage, or had Mirza only disclosed the Registry Office marriage (which showed Nighat as a spinster) they would never have faced this situation. Certainly such cases encourage non-disclosure.

This case illustrates many of the problems identified in Section 1, not least that couples may find one opinion as to their status from one set of official institutions (a Registry Office and District Judge in this case) and an opposite conclusion from another set of official institutions (consular staff and immigration appeal tribunals).

The British system’s very pedantic attitude towards foreign law is also clear; it went by a limited reading of the statute book (Sec. 7 of the MFLO – see Section 4.2.1) rather than looking at how Sec. 7 is applied in Pakistan. Failure to follow the required procedure for *talaq* under Sec. 7 of the MFLO does not render a *talaq* invalid under Pakistan’s law and if Nighat’s divorce from Arshad were ever challenged the courts would be extremely likely to give her the benefit of the doubt, especially given the passage of so many years. Throughout the case there was no indication that Arshad’s intent had been any other than to conclusively divorce Nighat. Moreover, Nighat appears never to have contested this divorce and actually took steps to clarify that she was indeed divorced. Several years passed before she remarried during which the previous divorce appeared a long-settled matter in her past. No doubt the judgement which found Nighat and Mirza’s marriage void for bigamy (precisely polyandry) was ‘technically’ correct. But it also resulted in clear injustice. The only conclusion is that either the text of the law regarding the controversial question of ‘other proceedings’ needs amendment or clarification through judicious judicial interpretation.

It is hard not to see the restrictive application of law in such cases as framed by immigration controls. In normal civil law, when parties have clearly acted in good faith but have simply been caught out by ignorance and poor advice, they would be given the benefit of the doubt.

Contrast this case with another status of marriage case heard by the Family Division one year before the Mirza Baig case. This similarly involved attempts by a couple to clarify their status, incorrect advice and the passage of many years before problems surfaced. But in this instance, the couple (wealthy Arabs already resident in London) were presumed to be validly married,²⁷ a privilege not extended to Nighat and Mirza.

c) The impossibility of unravelling the situation

Nighat is, in the eyes of Pakistan's law, validly divorced and validly married to her second husband, but still married to her first husband in the eyes of British law. The British court said she retains the option of seeking a divorce from Arshad Mahmood in the British courts. But in human terms how is a woman to approach a man who divorced her practically a decade before (presuming she has means of contacting him) and tell him she is initiating divorce proceedings against him? On what grounds? An uncontested divorce? Her only option is to quietly divorce Mirza, collude with Arshad to file for divorce or jactitation of marriage in Pakistan and then remarry Mirza. If 'refusal' was marked in Mirza's passport, it is three years before he can apply for entry clearance again.

The Story of Ms. A.

a) The facts

18 year-old Ms. A. is a dual national of Britain and Pakistan, and a habitual resident in England since her birth. She married a young man of her own choice who was also a Pakistani and British dual national. The marriage was performed in England at a friend's house, in the presence of three *imams* who solemnized the marriage and four other witnesses. After this marriage she lived with her 'husband' for a couple of days and the marriage was consummated, but she returned to her natal home in an unsuccessful attempt to seek her parents' approval. Under pressure from her parents, she became double-minded about what her next steps could and should be.

Finding herself in this bind, she has approached Bedfordshire police Special Unit in the hope of clarifying her status both as a Pakistani Muslim and as a British citizen. The officers are themselves uncertain about the legal and social options and approached WLUML for advice.

Under English law her marriage is not valid; in order to be recognized it had to be either before the Registrar or at a licensed place for marriage. On the other hand, she can seek to have her marriage validated in Pakistan because mere non-registration of marriage does not render the marriage invalid and registration can be done at any time (see Section 4.2). Evidence in the form of the certification of the *imam* who solemnized the marriage and witnesses in person or as affidavit would suffice. Ms. A is now an unmarried-married woman.

b) The analysis

An apparently simple situation – that of a young woman seeking to marry against parental wishes – becomes highly complicated in a situation where people are confused about their rights and responsibilities. Ms. A believes she is validly married, her parents insist she is not, and neither party is aware of the legalities involved although they know enough to recognize that uncertainty regarding marital status is sufficiently serious to require official advice.

c) The potential consequences

The extraordinary possibilities arising out of this apparently simple situation are further illustrated by looking at the various developments now possible.

Ms. A.'s parents have not approved of her marriage. Section 55 of the 1986 Family Law Act permits them to seek a declaration through nullity proceedings that the 'marriage' was void at its very inception as it was solemnized in contravention of the requirements of the Marriage Act 1949 (which require a Registry marriage or marriage in a place registered for civil ceremony). Ironically, the parents (who oppose the marriage on account of it being an inter-sectoral relationship) can use the English system to reassert their power over their daughter and achieve an end which is not possible in the Pakistani system (despite misperceptions, there is no bar to Shia-Sunni marriages in Pakistan law). Her husband can seek a similar declaration. The only way to counter such a situation and if the husband wants to remain in the marriage, would be for the couple to contract a civil marriage in Britain. If her husband is not supportive but she wants to retain her marital status, she would have to go to Pakistan and seek an order from the Family Court (by filing any suit eg, a maintenance suit that would establish whether or not marriage subsists - at least under the eyes of the Pakistan law).

A further hypothetical possibility is that she now has a child out of this marriage and the question of legitimacy arises. Once the subsistence of the marriage is established, the child would be legitimated and the husband would be obliged to maintain her and the child.

If the husband or the parents obtain a decree of nullity, the husband's maintenance obligation is ended. Ms. A can still however apply for a maintenance decree under Pakistan law. This is where an unending conflict of laws would begin. Apparently a decree for maintenance by the Pakistani court is enforceable in England.²⁸ However, in Ms. A's particular situation the English court can refuse enforcement on the grounds that the Pakistani court had no jurisdiction because of the nullity verdict of the English court. Nevertheless, Ms. A is still entitled to get the maintenance decree enforced in Pakistan and any property in Pakistan of her dual national husband can be attached in enforcement of the decree.²⁹ In other words, Ms. A could see a continuous battle between the two legal systems.

Because of the conflict of the two legal systems to which they are subject, the two spouses face very different options in terms of getting out of this marriage and the possibility of subsequent marriage. Ms. A's husband can get out of the marriage using either of the two legal systems. He can either obtain a nullity decree or he can use Pakistan law by effecting a divorce through *talaq* under Sec. 7 of the MFLO.

This will free him from the marriage and he would not face any problems if he remarried in Pakistan, especially as he does not have to write his status on the marriage contract.³⁰ Even if he contracts another marriage in Pakistan without dissolving the first one (and even if that is without the polygamy permission certificate from the Arbitration Council), neither can that

marriage be declared void nor can he be held liable for bigamy or adultery. The only possible punishment he would face is for violating Sec. 6 of the MFLO and that also is only possible if either his first wife or second wife file a criminal complaint against him.

In complete contrast, Ms. A has neither the option of *talaq* nor of polygamy.³¹ If, as it now appears may be the case, Ms. A comes round to her parents' view and wishes to be done with her marriage, she may well be able to invoke Sec. 55 of the Family Law Act 1986 and her position would be clear as far as English law is concerned. But in the eyes of the Pakistan law she would still be married and would have to engage in legal proceedings for judicial divorce in order to clear her status and avoid any possible future complications of alleged bigamy and adultery in the event of her remarriage.

But if she now seeks dissolution of marriage in Pakistan, in whatever form, that divorce will be barred from recognition by the English courts on the statutory ground that under Sec. 51(2) of the 1986 Act no divorce will be recognized if there was no subsisting marriage.

Ms. A.'s current status will persist and will be a permanent hurdle to any subsequent marriage as long as she does not declare herself to be a spinster. However, if she remarries in Britain without dissolving her 'marriage' and goes to Pakistan, it is possible that she could not only be held liable for bigamy, but could also be held liable for adultery. Both charges carry severe punishments under the Pakistan Penal Code and the Zina (Enforcement of Hudood) Ordinance, 1979.

The Story of the Policeman and the Bigamy case

a) The facts

A Pakistani origin British national woman and man were married in Luton. The husband went to Pakistan and married another woman. Luton Police referred the case to WLUML for advice on how to pursue a bigamy case.

On further enquiry, it transpired that the first marriage was no marriage at all having been conducted at an unregistered mosque.

b) The analysis

Luton Police were extremely keen to go all out and prosecute the man for bigamy without having first established the basic facts. Their continued emphasis on the fact that an imam had conducted the 'marriage' reflects a lack of knowledge of basic issues in family laws and the common presumption that mosques are just like churches and must be licensed places for marriage.

c) Unravelling the situation

With the British 'wife' entirely unprotected by British law and the husband completely able to contract a valid subsequent marriage under both British and Pakistan law (and indeed to bring this 'second-first' wife to the UK as a spouse), there is little the police or any other agency can do to help. It is a situation that could have purely been remedied by the preventive measure of having the first marriage in a registered mosque or undergoing a Registry marriage.

When is a Widow a Widow in the eyes of the Pension Authorities?

a) The facts

Shabana is a British citizen of Indian origin whose husband returned to Mumbai and married another wife and stayed there living with the second wife while still validly married to Shabana. A few months ago, her husband expired at the age of 67 but Shabana only found out more recently. In the meanwhile, her husband's second wife has been claiming her husband's pension. Shabana says the pension is hers by rights as she is the 'British' wife. But she has been told by the pension authorities that as the second wife was the one living with the husband at the time of his death and was nominated as the recipient, she has no rights to the money.

British High Commission staff in Dhaka have had cases where after a man's death it turns out that he had other polygamous wives in Bangladesh. In their knowledge, the UK wife and the other wives were all denied rights over their husband's pension, raising the question of where this money is now lying.

The widow of Mosabir Ali lived all her life in Bangladesh. Her husband who had worked many years in Britain received retirement pension from the 1970s until 1991 when he died. When she attempted to claim widow's benefit she was told that her marriage to Mosabir Ali in 1975 had been invalid as her 1973 divorce from a previous husband had been invalid. It was only in 1999, eight years after her husband died and 26 years after her divorce that the Social Security and Child Support Commissioners (the highest relevant appeal body) finally agreed that she was indeed the widow of her deceased husband and entitled to a widow's benefit.³²

b) The analysis

These three cases illustrate the uncertainties in the application of British law regarding the pension rights of polygamous wives or situations where the validity of their marriage is in doubt.

In all three situations, the women involved appeared helpless in the face of actions by their husbands and the interpretations given to these by British authorities. While in the latter case justice was finally achieved, it was only after an immense battle.

The fact that actions in the distant past that took place between two non-British citizens on foreign soil can become embroiled in conflict of law cases and subject to question in British courts illustrates the immense scope of the potential problems facing communities who straddle two or more jurisdictions.

The Divorce that wasn't a Divorce

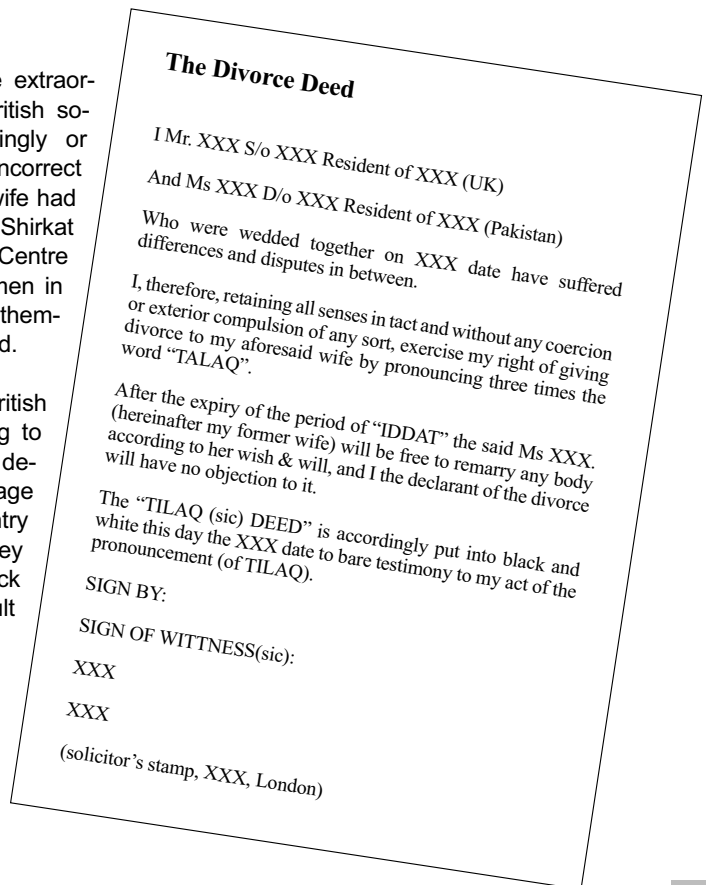
a) The facts

The box below is an exact copy of a 'divorce deed' issued by a North London solicitor's office to a woman of Pakistani origin married under Pakistan's laws to a British national of Pakistan origin. This 'divorce' is most clearly transnational (pronounced in Britain while the wife is in Pakistan) and without 'proceedings' (unless a copy of the 'deed' is sent to the relevant Union Council in Pakistan) and is thereby undoubtedly invalid in English law because it is a 'transnational divorce'.

b) The analysis

This document shows the extraordinarily harmful role of British solicitors who either knowingly or unknowingly provided incorrect advice.³³ Fortunately, the wife had sound legal advice from Shirkat Gah Women's Resource Centre in Pakistan but many women in such situations believe themselves to be validly divorced.

If they remarry another British national and while seeking to enter the UK as a spouse declare their previous marriage and 'divorce' to the Entry Clearance Officers, they would become very stuck through absolutely no fault of their own.



Married, Divorced, Married, Married (and ?Divorced), Married and Died

a) The facts

In the late 1960s, a man of Pakistani origin living in the UK married a local woman and brought her back to the UK to settle. Soon after, he took her back to Pakistan, divorced her and married his wife's sister. He brought his new wife to the UK, set up home and went on to have four children. While still married to his second wife, in 1995 following a row he went back to Pakistan, married a woman some 35 years younger and managed to bring her to the UK where he lived between two homes and maintained relations with both women.³⁴

In 2002 he went back to Pakistan and at the age of 62 married a 32 year-old divorcee with a young child, who saw the marriage to be a form of safety and protection for her child and herself, and who was unaware of her rights.

Meanwhile, on his departure from the UK, the 3rd wife had her suspicions that he may remarry. Distressed when her suspicions were confirmed, she visited the offices of a women's support group which works with the Muslim community. On her behalf they took advice from the Foreign & Commonwealth Office and Home Office immigration services. The Home Office requested all relevant documents such as her husband's passport details and the name and residence of the woman he intended to marry. All documents were provided and the British authorities informed the support group that there was no chance the husband could return to the UK with (yet) another wife.

The 3rd wife then divorced her husband, whether through the British courts or a *talaq* process is not known and remarried. With no knowledge of the UK and her rights the 4th wife arrived in the UK in October 2003 on a 6-month fiancée visa and no recourse to public funds. Her husband rented a bed-sit and lived with her on an ad hoc basis, sharing his time between the 2nd and 4th wives. He kept the latter locked up in the house and subjected her to rape and sexual abuse; he did not send his stepson to school and did not even buy them food. In early 2004, neighbours realised the extent of the abuse and put her in touch with a local Pakistan family, where she was able to have contact with women. By chance through this contact she met her husband's 3rd (now ?ex-)wife; she also made contact with her brother who had not known about the marriage or his sister's suffering.

The 4th wife was brought to the same support group by the 3rd wife, where she was advised that she could consider taking refuge provision and report the matter to the Police. With her brother and community leaders/members now involved, a *iirga* [traditional adjudication council] was called between the community men, her husband and brother. With the husband claiming that he had spent much money on the marriage and bringing her over to the UK, and the brother concerned about his sister's poor chances of a peaceful life/survival back in Pakistan, the *iirga* agreed that her brother would pay the husband £3,500 cash to ensure she remains his wife and stay in the UK. The husband then demanded more money. The support group was again approached and with her brother's support the 4th wife agreed with the police to be called in to the support group's office. Although a number of hours were

spent explaining the circumstances, the police did not take any statement or record what had happened as a criminal offence. The support group contacted the FCO for advice and were referred to a refuge in another city. The husband has since died.

b) The analysis

The support groups believes the reasons for the lack of action were that:

- The Police had no knowledge of what the law states regarding such a case;
- There were suspicions that due to her immigration status she may be making an allegation to ensure that she remains in the UK;
- She was so vulnerable that she would not be able to endure the pressure of going down the criminal route.

Whatever the police's reasons, the story illustrates the challenges facing support groups and legal professionals who would have to attempt to unravel the various statuses of all the parties involved. It also raises questions as to how, with all immigration controls in place and the kind of restrictive approach that has prevented the couple in our first case study from being united, an apparently British domiciled man may have been able to marry polygamously and bring in up to three wives to live in a clearly exploitative situation.

Endnotes

²⁷A-M v. A-M [2001] 2 FLR 6

²⁸By virtue of the Foreign Judgements (Reciprocal Enforcement) Act 1933 as amended by the Civil Jurisdiction and Judgements Act 1982. For enforcement of an order from a court of a Commonwealth country, order in council is required. Order to this effect has been made for Pakistan by virtue of the Pakistan Act 1990. See North & Fawcett, 1999: 464-465.

²⁹Under Sec. 14 of the Family Courts Act, 1964, maintenance decrees are enforced as recovery of arrears of land revenue and Family Courts have power to enforce maintenance decrees by attaching the property of the person against whom the decree is issued.

³⁰In the standard marriage contract there is no column for the husband to write his status at the time of marriage except if he is contracting a polygamous marriage he has to mention the reference of the Arbitration Council's certificate in clause 22 of the contract. A woman's status as single, widow or divorced has to be entered in column 4 of the contract.

³¹Ms. A does not have the delegated right of divorce (*talaq-e-tafweez*).

³²R(G)2/00 14.9.1999 CG/13358/96

³³In the famous Fatima case (see Section 4.1) R. v. Immigration Appeal Tribunal and Another, ex-parte Secretary of State for Home Department and Other Applicants [1984]1 All E.R. 488, which addressed three separate cases, in each a British solicitor had drawn up such a 'talaq deed'.

³⁴See Section 4.1.5 for details regarding the law on bringing polygamous wives to the UK.

Section 3

The Policy Context

3.1 The Muslim Community in Britain

3.1.1 Facts & Figures

According to the 2001 Census, out of a total British population of 57,103,927, those identifying themselves as Muslims were 1,588,890 (2.8%).³⁵ But for the purposes of research on recognition of Muslim marriages and divorces, this figure does not preclude some of the 15.1% and 7.8% of total population who stated they had no religion or did not state their religion, or indeed members of other religions being affected by the issues. For example, a White British Christian woman married to a British-Bangladesh Muslim male would still potentially be governed by the provisions of the Muslim family laws as enforced in Bangladesh (see Section 4.2).

According to government figures based on the 2001 Census, just under half (46%) of Muslims living in Great Britain in 2001 had been born in the UK while 39% had been born in Asia – mainly Pakistan (18%), Bangladesh (9%) and India (3%). A further one in ten Muslims (9%) had been born in Africa, including Somalia (2%) and Kenya (1%). Four per cent of Muslims were from parts of Europe outside the UK, including Turkey (3%) and the Former Yugoslavian countries (1%).³⁶

It is estimated that 50% of Pakistanis in Britain are from Azad Kashmir (AJK) (Samad & Eade, 2002: 14, citing Ballard, 1991), mostly from just Mirpur District. This is important for our study since the AJK area is not governed by the MFLO (see Section 4.2.2).

One must not forget that ‘the Muslim community’ is not always ethnically ‘Other’. Government policy, the media, and much of the non-Muslim and Muslim community equate ‘Muslim’ with ‘non-White’, blurring the line between racism and religious hatred. More than one in ten Muslims in England and Wales describe themselves as White (a total of 179,773 according to the 2001 Census). Those in the ethnically white group break down into 63,042 British, 890 Irish and 115,841 “other” whites.³⁷ Women who have embraced Islam outnumber male converts by about 2:1 (Haleem, 2003: 93, quoting British Muslims Monthly Survey, 2002: 8).

Analysing the statistics, government documents have said that national identity is strongly related to country of birth. Adults from all religious groups who were born in the UK were more likely than their foreign-born counterparts to give a British identity in the Census form. Almost all (99%) UK-born Jews, Christians and people with no religion had a British national identity. Nine out of ten UK-born Buddhists (94%), Muslims (93%), Sikhs (90%) and Hindus (91%) gave a British national identity.³⁸

More than half of Jewish, Muslim, Sikh and Hindu adults living in England and Wales in 2001 said that their religion was important to their self-identity. (Among Christians, only a fifth mentioned religion as important, although this was much higher among Black Christians.) After religion and ethnicity, being aged over 50 and being born outside the UK were also associated with rating religion as important to self-identity.³⁹

Although these statistics appear to give a clear-cut picture, sociological policy research stumbles when it comes to some of the categories. For example, Shah-Kazemi (2001:20) is one of the few studies to acknowledge that non-Muslim women and women converts are affected by the issues. But she uses a strange term 'ethnic UK' for the latter: "3.5% of applicants to the [Shariah council] were ethnic UK women, of whom 72% were Muslim". But 'UK' is not an ethnicity. Does she mean White or Mixed Race? What about Black women converts? One cannot use 'White' because Muslim Albanians, Kosovars and Turks are all 'White' even if vulnerable to ethnic discrimination. It is a minefield of political correctness, add to which the Muslim extreme Right's use of the term 'revert' instead of 'convert', with its hidden message that being Muslim is the 'natural' state for all humans.

If 27% of the 1,588,890 Muslims in Britain were born in Pakistan or Bangladesh, that means potentially 429,000 people subject to both British law and the Bangladesh-Pakistan Muslim Family Laws Ordinance, 1961.

This figure excludes their further tens of thousands of children and grandchildren who are entitled to dual nationality and therefore also potentially governed by two legal systems.

3.1.2 Historical Trends

Cardiff is home to Britain's oldest mosque and Muslim community, dating back to the 1860s.⁴⁰ However, the vast majority of the current Muslim community in Britain can trace their origins to the 1950s and 1960s wave of economic migration when mostly male South Asians came to Britain to occupy some of the lowest rungs of the employment hierarchy and their relationship with the British state was circumscribed by colonial precedents (Brah, 1996: 21). These migrants saw themselves as transients with the aim of earning money that could be remitted to the family back in Pakistan, often being replaced by another male member of the kin after a period of time (Pearl, 1986: 8). Until the Commonwealth Immigrants Act 1962, citizens of Britain and the Commonwealth could enter Britain freely.

By the mid-1960s, following the restrictive 1962 Act, South Asians started to make emotional and financial investments in a long-term stay in Britain and during this period a large number of families were reunited, constituting a second wave of migration up to the early 1970s (Brah, 1996: 27). Primary migration virtually ceased with the enforcement of the 1971 Immigration Act and in 1980 new Immigration Rules, mainly targeted at South Asians, were introduced with the aim of curtailing supposed abuse of the arranged marriage system as a means of continuing primary migration. The changes had particular implications for young Asian women and were attacked as both sexist and racist (Brah, 1996: 37-39).⁴¹

Due to gender role patterns, the migration of women from Muslim communities has been organically linked with the migration of their male kin (Jawad & Benn, 2003: xxiii). However, British women do support spouses entering the UK. In the late 1990s, there was an interesting rise in their number, from 255 in 1997 to 1,132 in 1998 (Jawad, 2003: 5 quoting Alibhai-Brown, 1998).

From the 1970s onwards there has been a growing number of South Asians who could claim dual nationality as having been born in Britain and today there are even third-generation South Asian Muslims; almost 60% of Muslims in Britain are below 25 years of age (Pearl & Menski, 1998: 60). In the meantime, Pakistan had also amended its Nationality Act, introducing a dual nationality system explicitly keeping in view the migrant population in Britain.

Finally, from the 1980s onwards new waves of migration from Muslim contexts followed political upheaval and conflict in, for example, the Former Yugoslavia, Iran, Iraq and Afghanistan.

But today the main form of expansion of the Muslim community in Britain is birth.

Muslims are primarily concentrated in ethnically distinct groupings in major urban centres such as Birmingham, Bradford, Manchester and London; Birmingham alone has some 80,000 Muslims, most of whom can trace links back to Pakistan.

3.2 Social Practices among South Asian Muslims regarding Marriage and Divorce

3.2.1 Transnational marriages

Samad & Eade is an excellent 2002 study, supported by the Foreign & Commonwealth Office, which documents in detail attitudes and practices regarding marriage among two Muslim communities from Bangladesh and Pakistan. Much of the following is taken from this study and while acknowledging that practices among South Asian Muslims are diverse, there is also much that applies to all those of South Asian Muslim origin.

The Bangladeshi and Pakistani communities are highly diverse and marriage is conducted between sub-groups within these communities (Samad & Eade, 2002: iv). But in general parents continue to prefer a match from their own sub-group which can mean a limited pool of suitable candidates in Britain. Transnational marriages therefore continue, despite the evident problems they throw up. In Bradford, 50% of marriages are trans-continental (selected from Pakistan) while in Oxford the proportion is as high as 71% (Samad & Eade, 2002: 48-49 citing Simpson, 1997 and Shaw, 2001).

Shaw (2001) found British Pakistani families disturbed by the instrumental way their relatives treated marriage in Pakistan (Samad & Eade, 2002: 59). In some instances where the marriage had ended in divorce, the family felt it had been “primarily to facilitate the immigration of a husband with no intention of making a commitment to his wife or her family in Britain.” (Shaw, 2001: 327) This is bound to be a factor behind high rates of desertion, half-hearted *talaqs* and husbands exploiting the British legal system to deny their wives their rights.

Many of the cases seen by the Forced Marriages Unit involve issues of spousal visas, while immigration regulations featured in some way or other in nearly a third of the marriage cases studied by Shah-Kazemi (2001: 33). However, studies are careful to point out that immigration is not the trigger for forced marriage but a complicating factor whereby unhappy transnational marriages have the added complexities of immigration matters and multiple nationalities. Tighter immigration controls would not solve the problem of forced marriage but merely push such marriages abroad (Samad & Eade, 2002).

Young people argue that linguistic and cultural compatibility is important and only if appropriate candidates are not found in Britain would they look for a partner in South Asia. Most youngsters speak English as their main language. Women also mentioned educational compatibility as a factor (Samad & Eade, 2002: viii). Against this background, often youngsters emphasise their Muslim identity over and above their ethnic identity and attempt to follow 'proper Islamic' practices in marriage without considering that they are subject to statutory laws which may have entirely different provisions. Often to avoid a transnational marriage with someone they consider unsuitable, young couples (like Ms. A., see Section 2) may run away and 'marry' before an *imam*.

3.2.2 Marriage Registration and Awareness of the Law

The practice of 'traditional' arranged marriages is strongest among those groups which are least qualified and involved in manual work (Samad & Eade, 2002: 51). This is also the group most likely to be unaware of the law. But one should not presume that higher educational attainment and greater choice marriage practice is matched by greater awareness of laws or adherence to legalities.

Not all women who enter into *nikahs* without an accompanying Registry marriage are simply ignorant of British law. Our research found it common for a young couple to knowingly undergo such a *nikah*. While they are in no doubt that a Registry marriage is the only marriage of foolproof validity, many see a *nikah* as some sort of half-way house: sufficiently valid to satisfy or convince parents and moral conscience and 'book' the partner in anticipation of them being married off elsewhere by their parents, but also sufficiently informal to allow for easy undoing at a future date.

Imams are faced with a dilemma: either they provide (legally irrelevant) 'sanctification' for a relationship that is clearly on the verge of becoming sexual, or they refuse knowing that the couple are likely to then commit *zina* (a possibility strongly condemned by religion and custom). Many more liberal *imams* inform the young couple that they ought to have a Registry marriage in order for their partnership to be valid in the eyes of the law but are also willing to give their blessings to young couples in private ceremonies, feeling that at least the religious aspect has been taken care of. This is not just a question of easing consciences but also of avoiding the situation where the religious authorities become irrelevant to young people because they ignore their needs. There is also anecdotal evidence that the practice of *muta'a* [temporary marriage, traditionally only recognized by Shias] is increasing among young Muslims especially at university.

Given the complexities of the recognition of Muslim marriages and divorces when people are subject to two legal systems, youngsters are unknowingly storing up tremendous legal and social problems for themselves through such 'marriages'.

Out of 287 case files 1985-1995 examined at one of the Shariah councils by Shah-Kazemi, (2001: 31) 27% of *nikahs* had been conducted in Britain and were unregistered. Only 37% of women who had registered under the civil law, had had the civil ceremony before the *nikah*. Others had it on the same day (preferable) and after.

The poverty and isolation facing many women in Muslim communities in Britain (see Section 3.4) can only partly explain women's apparent lack of knowledge about how to validly marry and divorce. In some cities support services have information pamphlets available on the subject and even government websites carry useful basic information relating to validity of foreign marriage and divorce, and immigration. Why this information is not reaching a wider audience and what are the social obstructions or individual perceptions behind the lack of access needs further examination. There are signs, however, of a growing thirst for information about marriage and divorce laws.

3.2.3 Polygamy, Desertion and Divorce

With 68% of people of Pakistan or Bangladesh origin living in low-income housing compared to 21% of Whites, marriages in Muslim communities are undoubtedly under immense pressure from general social deprivation.

For the time being, the divorce rate among British Asians is considerably lower than the average 9% among the White population. But figures from the Muslim Women's Helpline indicate that marital difficulties are a growing problem (Samad & Eade, 2002: 60). The overwhelming majority of the Helpline's callers are from the Pakistani community and most are between the ages of 21-30 with calls mainly concerning marriage issues. This is substantiated by Shah-Kazemi who found that the vast majority of cases coming to one of the Shariah councils concern marital disputes. The women seeking dissolution were aged from 16 to 50s, across classes and educational levels (2001: 10).

Community practices may also contribute to the rising rate of marital breakdown. In several communities, a knee-jerk reaction to young men's involvement in drug use and petty crime or young women forming disapproved liaisons is to get them married off and thereby, hopefully, resolve the problem (Samad & Eade, 2002: 67). A similar response occurs when there are concerns regarding their sexual orientation. Girls of Bangladesh and Pakistan origin are becoming more educated than boys resulting in different expectations from marriage (Samad & Eade, 2002: 34). This may be a factor in the particular difficulty in finding suitable partners for young women (Samad & Eade, 2002: 49, citing Anwar, 1998: 111) and may be contributing to a rising number of marriages which are doomed from the start because of incompatibility.

Since polygamous unions function underground, it is impossible to even estimate the incidence. But indirect indicators do exist. For example, the national demographic predominance of Bangladesh men as compared to women is reversed in Tower Hamlets where the ratio between men and women in the 26-35 age range is 100:146 (Samad & Eade, 2002: 22, citing Eversley, 2001, 18). Women's groups are convinced this is due to a high rate of desertion often linked with polygamy (and not a shortage of eligible men as asserted by Eversley, 2001).

3.3 The Muslim Community and British Policy towards Migrant Communities and Multiculturalism

Critical analysis of British policy towards race and migrant communities and of multiculturalism has been a major focus of academic and human rights activist analysis in Britain in recent decades. It is beyond the scope of our study to even summarize this analysis and we shall only highlight some of the aspects which may be immediately relevant to the question of the recognition of Muslim marriages and divorces.

While there have been evident gains in terms of policy and attitudes, some argue that racism has entered a new phase and moved away from discourse about visible difference to discourse about cultural difference (Samad & Eade, 2002: 98 citing Gilroy, 1987 and Barker, 1981).⁴² Certainly political discourse both within majority communities and minority communities is today focused on cultural identity (particularly religious identity) in a mutually reinforcing cycle whereby threat and perceptions of threat create behaviour that brings fresh threat. Networking globally, WLUML has commented upon how fundamentalisms within all communities reinforce fundamentalisms in others (WLUML, 1997: 9). Others have pointed out how the culturalist assumptions underpinning the way multiculturalism has developed in Britain "amount to a kind of benevolent isolation of minorities" but offer examples of 'best practice' in certain local models (Vertovec, 1996: 52).

There has been eloquent analysis of how identity politics have combined with the harsh conditions of discrimination and social deprivation to produce a ghetto lifestyle that is tragically self-perpetuating in areas such as Bradford (Husan, 2003, 109).

Identity is a process which is hybrid and varies over time, space and place; a process that is always becoming but never completed (Samad & Eade, 2002: 2, quoting Hall, 1996, and Jackson & Penrose, 1993). But multiculturalism, which tends to essentialize and homogenize communities internally while emphasising visible external diversity, instead of producing a healthy soup may have almost frightened communities into coalescing around a more fixed identity. Those who have experience of both majority and minority Muslim contexts, find that the space for challenging monolithic visions of Islam and confidence in accepting diversity are generally greater in Muslim majority countries.

Today, in a policy context of government concern regarding forced marriages and honour crimes (customary practices by no means limited to Muslim communities), there is deep distrust within Bangladesh and Pakistan communities about government interest in matters pertaining to the private sphere. A focus group of middle class male participants dismissed research into forced marriages as poor with no beneficial legislative or administrative outcome; fears were raised that the intent of policy research is to systematically assail the community (Samad & Eade, 2002: 99).

But in the late 1960s and early 1970s, according to Dr. Ghayasuddin Siddiqui, Leader of the Muslim Parliament “the state system was totally alien to us and matrimonial disputes, if any (very few families were here), were resolved mutually without state involvement. The state’s own attitude was very indifferent and perhaps it did not recognize our existence at all. Apart from the jobs in which we were employed it had nothing to do with how our matrimonial affairs were dealt with. The men could do what they wanted and the women were illiterate and mostly confined to their homes.”⁴³ Case law for this period reflects the fact that the early interaction was in the rare cases when an aggrieved spouse tried to invoke the jurisdiction of the English courts or when the system for some reason responded to some action which was contrary to British public policy.⁴⁴

However, from the 1970s on, when primary migration slowed to a trickle and Muslims began to settle as families in Britain, the well-documented ‘myth of return’ began to dissipate and the attention of the community was focused on more than just the basic facilities for religious observance, but also on the development of institutions that would enable future generations to live as Muslims in Britain (Gilliat-Ray, 1998: 348, citing Anwar, 1979).

In 1984 a ‘Muslim Charter’ was produced which included the demand that ‘the Shariah’ (whose content remained specified) should be given a place in personal law. This was the culmination of a process which began in the 1970s when the Union of Muslim Organizations of the UK and Eire held several meetings towards demands that a separate system automatically applicable to Muslims be introduced. The demand was submitted to various government ministries and repeated in a meeting with the Home Office in 1989 and in public in 1996 (Yilmaz, 2001: 299).

But there has been no coherent demand for such an automatically applicable system since then. This is an indication that the precise content of such a system and who it would be administered by would be so contentious *within* the community that it is best left to a vague – and therefore *political* rather than legal – demand. Meanwhile, internal community wranglings are as much a question of internal politics as they are about attempts to formalize the community’s relationship with the larger society (Gilliat-Ray, 1998: 350).

Multiculturalism induces an unnatural homogenization within a community as government needs to 'talk to' entire communities through a more manageable number of 'representatives'. And at the same time, multiculturalism also heightens fractures within communities as various sub-groupings seek to make sure they are among the few 'representatives'. The outcome is that Muslim marriage and divorce in Britain is viewed almost uniquely through the lens of a conservative and South Asian interpretation.

Some Muslims point out that Islam emerged in a multicultural environment and Islam and multiculturalism in terms of peoples and beliefs are not alien to each other (Gilliat-Ray, 1998: 351). But the optimistic view that a positive new syncretic British Muslim identity was emerging among youth (Gilliat-Ray, 1998) in the late 1990s may have been rocked by the events of the 2000s: 9/11, the subsequent wars on Afghanistan and Iraq, 7/7 and increasing accusations of collective Muslim responsibility for terrorism. The polarisations that these events have thrown up have threatened the subtleties of multiple and fluid identities: people feel their backs are against the wall.

3.4 Muslim Women and British Policy

"Multi-cultural sensitivity is not an excuse for moral blindness."

Mike O'Brien, House of Commons Adjournment Debate on Human Rights (Women) 10 February 1999, endorsed by the official Working Group on Forced Marriages.

The women most affected by issues of recognition of Muslim marriages and divorces in Britain face serious social deprivation. Women of Pakistan and Bangladesh origin are the least likely category of all men and women in the UK to have degrees (only 7% in 2001-2002), while 40% and 48% respectively are unqualified and only 24% and 17% are employed. (Husan, 2003: 107, quoting the 2001 Census).

It is acknowledged that women in the Muslim community suffer violence, prejudice, discrimination and exclusion (Runnymede Trust, 1997: 11) at the hands of state institutions and those outside the community.

But women in Muslim communities equally have to face considerable pressures from within. Research in 1998 by Newham Asian Women's Project on the problems facing young Asian women found the strongest were the internal pressures and not the external racism (Husan, 2003, 114). While some may argue that for Muslim women this may have shifted in the 'war on terror' context, what has not changed are the enormously powerful signals given to women contemplating deviation from the path chosen for them. As the symbols of the collectivity, women in Muslim communities in Britain face a powerful edifice in which loyalty to the faith, family, religious group and class is all inextricably interlinked (Husan, 2003: 121).

Small wonder that these combined internal and external pressures are manifested in a suicide and self-harming rate that is far higher than the national average (Husan, 2003: 113-114).

The government has been slow to address family matters in minority communities overall. The 1998 Cabinet Office document *Delivering for Women: Progress so far*, produced apparently as part of the 1995 Beijing World Conference on Women follow-up process, mentions nothing about family laws.

It was only after pressure from non-governmental organizations in Britain and abroad that action began to be taken in the late 1990s to support women in situations of forced marriage and honour crimes. It has been established that Government and the statutory services need to understand and value the diversity of ethnic and religious minorities and ensure it is accounted for in developing policies and delivering services, without compromising human rights (Home Office: 2000, 10). But fully five years later, a national consultation on forced marriages continues to emphasize 'community sensitivities' rather than women's human rights. Meanwhile, government reports on the specific issues facing women in Muslim communities have ignored family law matters even though these seem to rank high in the problems that support groups deal with on a daily basis.

The multiculturalist downplaying of problems within a minority group (in order to concentrate on the vital task of combating racism) denies a voice and support to those subjected to oppressive practices especially young girls and women. At the same time, progressive thought is becoming marginalized particularly within the ghettos, while the influence of cultural relativism has meant Leftists and feminists among the majority community have generally excluded Asian and especially Muslim women from campaigns for equal rights (Husan, 2003: 116).

Although there are an increasing number of self-formed support groups for women in the Muslim community, most are very small, under-resourced and relatively isolated from each other at the national level, and with poor international linkages. There is no women's movement visible as such within the Muslim community, in contrast to many countries in the developing world with majority or even minority Muslim populations and in sharp contrast to the very vibrant women's movements in Bangladesh, India and Pakistan. Some women activists from a Muslim background are present in mainstream British women's groups or 'Black' women's groups. But observation indicates that this is generally far below their relevant proportion of the population and suggests they perceive a lack of space for themselves within that mainstream.

In short, young women from Muslim communities who seek to assert rights both within the community and vis a vis the racist-classist majority have nowhere to go. Some briefly flirt with Islamist groups, most becoming quickly disenchanted with the instrumentalization of their membership and uncovering the restrictive interpretations of women's rights in

Islam propounded by supposedly 'moderate' groups. These are the young women who are experimenting with identity, interpretations of Islam, and sometimes in the process finding themselves with uncertain marital status after entering an unregistered *nikah*.

The nascent Muslim Women's Network (MWN), which aims to bring Muslim women's voices to Government, may be a step towards a more coherent and visible women's movement within the Muslim community. Significantly, it grew out of a series of meetings in 2001-2003 at the behest of the then Minister for Women, Patricia Hewitt, and has been provided strong secretarial support by the statutory Women's National Commission. Women at these meetings expressed considerable anger that when Government chose to consult, it was talking largely to (conservative, male) 'community leaders'. The MWN's series of listening exercises taking place in late 2005 - early 2006 hope to produce a report identifying the needs expressed by women in Muslim communities themselves.

Endnotes

³⁵<http://www.statistics.gov.uk/ccil/nugget.asp?id=954>

³⁶<http://www.statistics.gov.uk/ccil/nugget.asp?id=958>

³⁷<http://www.timesonline.co.uk/article/0,2-988659,00.html>

³⁸<http://www.statistics.gov.uk/ccil/nugget.asp?id=958>

³⁹<http://www.statistics.gov.uk/ccil/nugget.asp?id=958>

⁴⁰Dr Sophie Gilliat-Ray, Director of the Centre. "Few people know that the first mosque in the UK was established in Cardiff in 1860. " <http://www.cardiff.ac.uk/for/prospective/inter/news/islamcentre.html>

⁴¹Brah notes there were even cases of Asian women being subjected to 'virginity tests' with the purported aim of establishing 'primary purpose' migration in the instance of South Asian fiancées.

⁴²The discrimination and harassment sometimes experienced by Muslim women who veil (including White women) indicates that the distinction between visible and cultural difference is not so simple, or that 'visible' difference may not only be determined by race and ethnicity.

⁴³In interview.

⁴⁴As in *Alhaji Mohammad v. Knott* [1969]1 QB 1, where following a Nigerian man's marriage with a 13 year-old girl, neighbours approached the Magistrate's Court for protection of the child bride.

Section 4

The Legal Context

This Section examines in detail the legal provisions which apply to marriages between those who are theoretically subject to both British and Muslim family laws in Bangladesh and Pakistan, as well as Pakistani Kashmir (Azad Jammu & Kashmir) and India.

We begin with examining the British system as our focus is to raise policy questions regarding this system. However, our critique of the British legal system is not to imply that South Asian Muslim family laws are free from discriminatory aspects or problems in implementation and definition. WLUML and networking organizations have elsewhere equally sharply criticised these laws (Warraich & Balchin, 1998; WLUML, 2003; WLUML, 2006 forthcoming). Similarly, our criticism of the British system is not to agree that demands for separate family laws for Muslims in Britain would address the current rights violations and confusions (see Section 7.1).

Indeed, the problems described below regarding the operation of English law regarding the recognition of Muslim marriages and divorces are to be understood as part of a combination of interactions between two formal systems – the British and the foreign – as well as between the formal British and foreign systems and non-formal Muslim law structures operating in Britain such as the Shariah councils.

4.1 British Law and Migrant Communities

The operation of modern law centres around formalities and technicalities, of certifications, expertise based on certifications and hierarchical courts. In order to strengthen and validate its power, modern law relies more on its own artificial rationale and seeks to distance itself from the realities of the ‘other’, as eloquently described by Goodrich. Regarding common law, the basis of modern British law which maintains its hold over British South Asian Muslims in family matters through the doctrine of ‘public policy’, he notes its logic “has been one of a comparable lack of alternatives, of a refusal to recognize that vast host of the ‘other’: ... the marginal.” (Goodrich, 1990: 184)

On the whole, family law as it is interpreted and applied in Britain today has just tightened the ‘jurisdictional screw’ over the matrimonial acts of British South Asian Muslims, resulting in shunting them out of the system rather than including them within the legal system in a favourable manner.

The exclusion of South Asian Muslims is illustrated by the Fatima case which involved the immigration appeals of three women.⁴⁵ One was denied leave to stay on the ground that her civil marriage in England was *ab initio* void because her British national Pakistani origin husband’s earlier dissolution of marriage through *talaq* was termed a ‘transnational *talaq*’ and was not recognized; the second marriage was therefore regarded as a polygamous marriage which an English domiciliary is not permitted to contract. According to Pakistan law (the law of her domicile and nationality), she was validly married,⁴⁶ she had to return to Pakistan as an ‘unmarried - married’ woman.

The artificial rationale of English family laws was clearly demonstrated in this case, where Judge Taylor noted that while his decision may seem 'technical and even hollow', the statutes "lead plainly and inevitably to this result, which is in accordance with the policy of the legislation." He commented that all the applicants needed to do was to go briefly to Pakistan to seek validity of their divorces.⁴⁷

Britain, a former colonial power in a post-colonial situation, now faces a conflicting situation of legal pluralism which it played a part in creating.⁴⁸ To counter the complexities arising out of this situation, the British state is attempting to use the power of the state's modern law against other legal systems which this modern law declares to be mere customs. But the modern British state has overlooked the fact that, whereas in the colonial period, the British state was the sole authority vis a vis the populations of South Asia, in the post-colonial period these populations are also subject to sovereign South Asian states.

The attitude of English law towards South Asian Muslims over the past few decades reflects closely the changes which have taken place in overall state policy towards migrants. Initially it was assumed that migrants and their descendants would automatically assimilate themselves in British society (Brah, 1996: 23). By the early 1970s it was clear that assimilation was failing and the liberal policies of 'integration' meant English law began to make significant allowances for Muslims in Britain. But the changes introduced in the law and legal practice have been neither coherent nor systematically researched in depth (Pearl & Menski, 1998: 68). Although Muslim law is recognized as law under the rules of private international law, this is only as overseas law. But for South Asian Muslims in Britain, Muslim law is not recognized as a law "because of the official law's technique of treating all ethnic minority laws as customs or cultural practices." (Pearl & Menski, 1998: 69) Personal laws are defined as 'customs' which are permitted as long as they do not conflict with English statutory law (Bano, 2000: 7). English law still only recognizes matrimonial practices which do not offend the 'core values' or 'shared values' of English culture (Pearl & Menski, 1998: 69). Hence, even though the British state has espoused multiculturalism, "Cultural tolerance cannot become a cloak for oppression and injustice within the immigrant communities themselves." (Poulter, 1992: 176, cited in Pearl & Menski, 1998: 69)

Although since the early 1970s, the British state has attempted to bring in laws to address family law issues among the Muslim migrant population, these have been both slow and piecemeal. Each set of new laws has created fresh complications.

In their approach to the issue of recognition of marriages, the English courts have appeared to be going by the theoretical possibilities rather than the factual situation, based only on the consideration of the place of marriage or the place of celebration of marriage. British modern law continues to focus on formalities rather than realities, and has especially ignored the agency of South Asian Muslim couples to determine the character of their marriages.

The series of changes in English family laws specifically dealing with recognition of overseas marriages and divorces have continued to ignore the contextual realities of migrant South Asian Muslims and what Ann Griffiths in her study of Botswana law terms “the social processes that are central to the construction of people’s lives.”(Griffiths, 1998) Because the specific form and experience of family relationships varies so widely from culture to culture, it is clear that modern law will fail to address people’s needs if it continues to attempt to enter their lives in a monolith form - as the British state with its refusal to recognize overseas marriages and divorces is attempting.

The bulk of case law deals with the recognition of foreign divorces rather than marriages, both because English law is stricter regarding the recognition of foreign divorces than foreign marriages and because whereas a couple must logically be in the same country when marrying, very often when divorcing they are in different countries and greater conflicts of laws issues arise.

4.1.1 Prior to 1971: Little Interaction between Muslim Migrant Population and the British System

For a considerable period of time, almost until 1972, apart from a few exceptions (discussed below) there did not seem to be any voluntary interaction between the Muslim migrant population from South Asia and the English courts dealing with matrimonial issues. Apart from their own unwillingness to engage with the British legal system, most migrant Muslims even if they had wanted to were unable to approach the English courts for matrimonial relief (meaning orders regarding issues such as nullity, legal separation, divorce, and maintenance).⁴⁹

This was because the English legal system lacked statutory jurisdiction over most marriages between migrants and did not recognize the matrimonial status of the vast majority of South Asian Muslims.

Domicile was the primary ground for invoking the jurisdiction of the English courts under common law rules. But the majority of migrant Muslims from South Asia had not as yet acquired English domicile, whose narrowly constructed rules generally excluded them.⁵⁰ For example, a person cannot have two domiciles at the same time.⁵¹ Moreover, social practice meant migrant South Asians frequently visited their country of origin and were unable to meet the domicile criteria which applied until 1972: “That place is properly the domicile of the person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.”⁵² The only other option for invoking jurisdiction was for the couple to have contracted a civil marriage in England under the Marriage Act 1949.⁵³

The major ground on which courts refused jurisdiction on foreign marriages, including those contracted between Muslims in South Asia, was the issue of 'polygamous' marriages. Since the 19th century case of *Hyde v. Hyde*, marriages under a polygamous system were refused relief because "English matrimonial law only applied to the Christian idea of marriage... and was wholly inapplicable to polygamous marriages."⁵⁴ How polygamous marriage was defined or understood was another problem, discussed in Section 4.1.2.

This meant the English courts did not acknowledge Muslim marriages solemnized in England other than under the Marriage Act 1949 nor did they acknowledge foreign Muslim marriages contracted in a jurisdiction where polygamy was permitted to Muslims, (for instance Pakistan or India). The sweeping disdain for all things 'foreign' was evident in the fact that jurisdiction was denied even to foreign Muslim marriages which were factually monogamous or where a wife had (as she is entitled to under Muslim laws) stipulated a condition that the marriage be monogamous. This rule was applied even where otherwise the court had jurisdiction either because the parties were domiciled in Britain or because of any inherent jurisdiction under common law rules. Prior to 1972, "the tendency was for the courts to disregard such marriages for all purposes on the inadmissible ground that 'it is a union falsely called marriage' and one that merits no recognition in a Christian country." (North & Fawcett, 1992: 621) Similarly, there was no statutory jurisdiction for the English courts to recognize or refuse validity of foreign divorces.⁵⁵

The only other option was for a migrant South Asian Muslim to have married in monogamous rites in India under the Special Marriages Act 1954, or theoretically those tiny few, if any, who had married in Pakistan (at that time included Bangladesh) under the Special Marriages Act 1872. The sole condition of marrying under the 1872 Act was the renunciation of the parties' religion and spouses married under this Act could not invoke any relief under their personal law.

The 1971 Law Commission (No.42) ***Family Law Report on Polygamous Marriages*** commented at length on the problems thrown up by the English law's restrictive approach towards foreign marriages under systems permitting polygamy. It noted that there was no reason why a foreign polygamous marriage should be treated differently from a foreign monogamous marriage, adding that "The application of two systems of divorce law in England hardly seems likely to facilitate the integration of immigrants into English society.... The denial of relief cannot achieve any change in the standards of behaviour of people who have made their home in England. On the contrary, denial of relief not only permits parties to escape from their obligations, lawfully entered into under another legal system, but tends to perpetuate the polygamous situation because the marriage cannot be ended." (Law Commission, 42: 14)

Examples of the discrimination strengthened by the British system, and noted in the Law Commission's Report, included the fact that whereas a man could validly effect *ta'laq* upon his wife in the UK (this became impossible after 1 January 1974 under the Domicile and Matrimonial Proceedings Act 1973 Sec. 16(1)), the wife married under foreign Muslim laws

could not approach the English courts for maintenance because her marriage was not recognized. The Report rightly commented this was an advantage to men that the foreign system did not grant (Law Commission, 42: 21).

The contradictions of the law were such that while a man married under such a system could not divorce through the British courts because his marriage was not recognized for the purposes of matrimonial relief, neither could he take another wife, as pointed out by an English court in a 1956 case.⁵⁶ The result of such provisions was not only that it actually encouraged evasion of responsibilities but forced migrant populations to return to the jurisdiction of their origins if they wanted to sort out their marital issues.

The fact that the courts had identified the failings of the system as long ago as 1956 and that it was not until 1995 that the question of the English courts' jurisdiction over foreign Muslim marriages was completely settled not only encouraged unscrupulous spouses to take advantage of uncertainty over jurisdiction and misperceptions about the status of Muslim marriages. It is also illustrative of a wider problem: the British legislature's unwillingness or inability to address the family law problems facing migrant Muslim communities in Britain. This is surely a question of politics rather than law.⁵⁷

4.1.2 The Courts' Jurisdiction to Give Matrimonial Relief to Marriages Contracted in Systems Permitting Polygamy - 1971 – 1982: Questions of Habitual Residence and Domicile

A flurry of major legal changes came in the early 1970s, by which time many South Asian Muslim families had settled in Britain with greater permanency. While there was some expansion of jurisdiction, there was by no means a sudden rush to bring Muslim marriages and divorces into the fold and much of the legislation in the past three decades has been a messy attempt to 'deal with the situation' created by the blatant clash of systems.

Although the Matrimonial Proceedings (Polygamous Marriages) Act 1972 overrode the Hyde v. Hyde principle,⁵⁸ recognition for Muslim marriages was only partially opened – and for many marriages it was questioned in court whether it had opened at all.

The question of whether or not matrimonial relief can be granted by an English court is particularly important for migrant women because of the issues covered under such relief: not only nullity, legal separation, and divorce but also wilful neglect to maintain, variation of maintenance agreements, declaration regarding validity of marriage, petition for declaration of legitimacy, presumption of death and dissolution of marriage (ie, desertion). These latter were all issues vital to women's security, particularly since those married under foreign systems tended to be cut off from family support systems while in Britain and were more economically vulnerable.

The possibility of relief for marriages contracted under systems permitting polygamy was granted under Sec. 47(1) of the Matrimonial Causes Act 1973 (which reiterated much of the 1972 Act). This Section stated that "A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage

by reason only that the marriage in question was entered into under a law which permits polygamy.” Thus whereas previously the English courts would not even entertain matrimonial questions relating to South Asian Muslims married under their foreign system, following the 1973 legislation they now had expanded, even if still very limited, jurisdiction.

The inclusion of the word ‘habitual residence’ as a criteria for jurisdiction under the Domicile and Matrimonial Proceedings Act 1973, Part III also enhanced the jurisdiction of the English courts over marriages between migrants from South Asia who were non-British nationals and not domiciled in Britain. Under Sec. 5(2)(b) if the husband or wife was a habitual resident in England for a period of one year up to the date when proceedings were begun, the habitual resident or even the other non-resident spouse could approach the English courts. This provision enabled those aggrieved spouses who had never visited Britain to file a petition for matrimonial relief.

Sec. 5(2) was amended in 2001 to give effect to the European Community’s (Matrimonial Jurisdiction and Judgements) Regulations 2001. Domicile-based jurisdiction has not changed while habitual residence based jurisdiction has in effect also not changed as the EU Regulation applies to nationals of non-Member States whose links with the territory of a Member State are sufficiently close.⁵⁹

Not defined in any law, ‘habitual residence’ has to be proved on the basis of evidence. The House of Lords case of *Barnet London Borough Council v. Shah*⁶⁰ held that “habitual residence was similar to concept of ‘ordinary residence’.” This view was followed in subsequent family matters, as in a divorce case⁶¹ where the judge held: “In my view, there is no real distinction to be drawn between ‘ordinary’ and ‘habitual residence’. It may be that in some circumstances a man may be habitually resident without being ordinarily resident but I cannot at the moment conceive of such a situation... ‘Habitually’ means settled practice or usually, or, in other words, the same as... ordinary residence - a voluntary residence, with a degree of settled purpose.”

Another advantage was that once proceedings had begun, even if the habitual resident then left the country and acquired habitual residence elsewhere, the case could continue to be heard; a cross-petition by the other spouse on any related matter could be heard though factually at the time neither of the spouses was habitually resident in England.

However, by the early 1970s many migrant Muslims had acquired British domicile. Sec. 4(d) of the 1972 Act, which was reiterated in Sec. 11(d) the 1973 Matrimonial Causes Act, stated that a marriage celebrated after 31st July 1971 “shall be void on the following grounds: in the case of polygamous marriage entered into outside England and Wales that either party was at the time of marriage domiciled in England and Wales.” It added that, “for the purposes of this provision, a marriage may be polygamous although at its inception neither party has any spouse additional to the other.”

Also note the subtle differences in terminology used in Sec. 47(1) and Sec. 11(d): a marriage “entered into under a law which permits polygamy” contrasted with a “polygamous marriage”. Many migrant Muslims did not see themselves as in a ‘polygamous marriage’ because they were monogamous, and similarly in the courts there was debate about what to do with marriages that were ‘potentially polygamous but factually monogamous’.

Thus the Matrimonial Causes Act 1973 raised immense social and legal problems for South Asian Muslims who had permanently settled in Britain. If they returned to South Asia, as was customary, to contract a marriage under local laws, the validity of the marriage would remain subject to challenge under English law. For those now domiciled in Britain the courts would first examine whether or not the marriage was recognized at all and only then begin to offer matrimonial relief. This also began problems in spousal immigration to Britain.

4.1.3 Inconsistencies in Case Law Regarding ‘Polygamous’ Marriages – Finally Settled in 1982?

For some two decades the English courts debated how to understand and define the character of marriage, ie, whether it is polygamous or monogamous. This debate, although now settled, has left a lasting impact because it so dominated perceptions about Muslim marriage and the law within the Muslim community and among the wider public and institutions including police, support agencies and even some legal professionals.

There was an inconsistency in case law regarding how to determine the character of a marriage. In the *Ali v. Ali* case⁶² the character of marriage was determined by the law of place of celebration of marriage, whereas in *Radwan v. Radwan* the criteria was the law of intended matrimonial home.⁶³ Even the 1985 Law Commission Report (No.146) ***Private International Law: Polygamous Marriages, Capacity to Contract as Polygamous Marriage and Related Issues***⁶⁴ noted that there were two mutually exclusive alternative theories concerning the choice of law rule governing the capacity to marry under a system permitting polygamy (Law Commission, 146: 4-5).

In *Ali v. Ali*, the husband petitioned for divorce on the grounds of desertion while the wife petitioned for divorce on the grounds of cruelty and adultery. However, the first question before the court was whether it had jurisdiction. The *Ali* marriage was held in principle to be potentially polygamous (though factually it was monogamous) because of the law of place of celebration. It had taken place in India which permitted polygamous marriage. But after a lengthy discussion over whether the character of a marriage changes with a change of domicile, it established that the husband had in fact acquired an English domicile of choice. The court declared that the marriage had thus changed its character from polygamous to monogamous. Hence the court could hear the petition. The court relied on Dicey’s ***Conflict of Laws*** which stated that “the matrimonial jurisdiction of the court is confined to marriages which are the voluntary union for life of one man and one woman to the exclusion of all others.” (7th Edition: 288, r.38)

Radwan v. Radwan dealt with a marriage between an Egyptian husband already married to an Egyptian woman in Cairo, who later married an English woman at the Egyptian consulate general in Paris. It was a polygamous marriage recognized by Egyptian law. The couple lived in Egypt but moved to Britain and the husband acquired an English domicile of choice. The second wife subsequently petitioned for divorce, while the husband sought recognition of his *talaq* effected at the Egyptian Consulate in London. As the parties had intended to live in Egypt when they married and since English law recognizes that the marriage was valid by the law of parties' intended matrimonial home it was valid in English law. Here the court overlooked the fact the wife was an English domiciliary and could not enter into a polygamous marriage (Dodds, 1994: 14). Another example of the courts not considering the law of domicile of one of the spouses was in Lawrence v. Lawrence where the Radwan case was considered and followed.⁶⁵

This entire debate also ignored legislative changes in many Muslim countries. Tunisia and Turkey have banned polygamy outright, and although polygamy may be permitted in Pakistan and Bangladesh, a number of measures have been introduced to curtail the practice. These include not only the legal requirement that permission be sought from the arbitration council, and that polygamous marriages in violation of legal procedure be penalized, but also the introduction of a standard marriage contract which opens the possibility of a couple agreeing to keep the marriage monogamous. The position of British law and debates in court cases indicate that there is a fundamental misunderstanding about the very nature of a Muslim marriage, which is basically a contract between a man and a woman. All the terms and conditions of each marriage are governed by that contract and the two parties, through mutual agreement, can set reasonable terms through the contract which are not inherently opposed to the purpose of a Muslim marriage; restriction on polygamy is by no means opposed to this purpose. Various clauses in the Muslim marriage contract in Pakistan are clear proof of this.

The British system's understanding of the character of a Muslim marriage and greater willingness to grant matrimonial relief to parties in such marriages was in part resolved in 1982 in Hussain v. Hussain. For the first time an English court held that a marriage between a Pakistani Muslim domiciled in England and a Pakistani woman domiciled in Pakistan could never **actually** become polygamous, though the marriage was potentially polygamous. As an English domiciliary, English law prevented him from taking another wife; the wife was a Pakistani woman and Pakistan law prevented her from taking an additional husband. Therefore neither party had the capacity to marry again, and Sec. 11(d) did not apply, and so the marriage was not void, as the husband had contended. Judge Ormrod in court of appeal made a detailed analysis of Sec. 11(d) and its effects. He noted that Sec. 11(d) "is not very happily phrased", adding that "it is difficult to conceive why Parliament, in an increasingly pluralistic society, should have thought it necessary to prohibit persons whose religious or cultural traditions accept polygamy from marrying in their own manner abroad simply because they were domiciled in England and Wales."⁶⁶

4.1.4 Marriages under Laws Permitting Polygamy Recognized in 1995

Although *Hussain v. Hussain* resolved some of the issues regarding recognition of foreign marriages, as Judge Ormond himself noted in his decision it had still not resolved the issue in total as the primary consideration was the English domicile of the husband. Had the wife been an English domiciliary and the husband a Pakistani domiciliary, the wife's domicile would not have permitted her to enter into a marriage under a system which permitted polygamy - but the husband could indeed have taken an additional wife under the law of his domicile.

The 1985 Law Commission Report No. 146 whose focus was polygamous marriages stated after discussing the *Hussain* case and the fact that issues remained unresolved: "We have accordingly arrived at the conclusion that the rules governing capacity to enter all polygamous marriages should be placed beyond doubt by legislation." (Law Commission, 146: 10) The Report's emphasis on clarifying the status of **all** polygamous marriages was important not only for those situations as noted by Justice Ormond where the wife was an English domiciliary. There was also the question of the effect of the *Hussain* judgement on past marriages. If, for example, an English domiciled man in the same position as *Hussain* had married sometime in the period between 31 July 1971⁶⁷ and the *Hussain* judgement eleven years later but had been advised that his marriage was in fact void and had remarried, what would become of the status of the two 'wives'? After the *Hussain* judgement, the first marriage was understood to be valid, but what of the second marriage? The dilemma was pointed out in the Report (Law Commission, 146: 13), which discussed the wide-ranging potential impact on matters such as wills, property rights, pension, legitimacy, etc.

The widespread confusion created by the use of the term 'potentially polygamous' and debates about the character of people's marriage irrespective of their **actual** status was discussed at length in the 1985 Law Commission Report No. 146. The Report pointed out in contrast that the law in many areas affected by family law such as legitimacy, income tax, the Social Security Act 1975 and Child Benefit Act 1975, or claims from polygamous wives under the Fatal Accidents Acts, does not actually distinguish between monogamous and potentially polygamous marriages and that "The movement in favour of recognizing polygamous marriages [meaning those under a system permitting polygamous but factually monogamous] for very many purposes in our plural society is so broad ... that the civil law draws no distinction between actually monogamous marriages on the basis of the nature of the ceremony." (Law Commission, 146: 22).

As noted above, the Report insisted that legislation should place these matters beyond doubt. But it went one step further by proposing text in the form of a Polygamous Marriages Act 1985. Sec. 6(1) of the proposed Act (which was never introduced) proposed the repeal of the whole of Sec. 11(d) of the Matrimonial Causes Act 1973 (see Section 4.1.2 for text). It also proposed amendments to the Matrimonial Proceedings Act 1972 and the Matrimonial Causes Act 1973 which would have meant that in England, Scotland and Wales even those in factually polygamous marriages would have been able to approach the courts for matrimonial relief.⁶⁸

But it still took the British state over a decade to finally clarify once and for all the law regarding the recognition of marriages under systems permitting polygamy – ‘potentially polygamous marriages’ - ending one of the most disputed chapters in inter-country cases.

Sec. 5(1) of the Private International Law (Miscellaneous Provisions) Act 1995 states: “A marriage entered into outside England and Wales between parties neither of whom is already married is not void under the law of England and Wales on the ground that it is entered into under a law which permits polygamy and that either party is domiciled in England and Wales.”

Perhaps the most positive development since the mid-1980s has been the June 2005 House of Lords judgement on domicile. This opens the English courts to hear the matrimonial disputes of many categories of foreign marriages and foreign nationals. It which marks a significant turnaround from the atmosphere of utter rejection of all things ‘foreign’ that prevailed in the post-war era.

4.1.5 Changes in Law Regarding Actually Polygamous Marriages

Of course, an actually polygamous marriage of a British domiciliary remains void.

Until 1988, men who were not domiciled in Britain at the time of the marriage could bring more than one wife into the UK. Under Sec. 2 of the Immigration Act 1988 only one wife could be brought in (with no specification as to whether this was to be the first or any of the subsequent wives). Very few families were actually affected since according to the then Home Secretary only some 25 polygamous households were being set up in Britain per year (Shah, 2002: 13, quoting H.C. Debs. Vol 122, col. 785).

Shah, 2002 traces in detail the history of the experience of largely Bangladeshi polygamous marriages and the various problems they encountered in immigration law. After 1988, entry to the UK began to be refused to polygamous wives although without comment on the status of their marriages. However, in some instances where for example the husband was presumed to be an English domiciliary (generally on the basis of how the Entry Clearance application was completed), wives were denied entry on account of their marriage being void and children were in effect declared illegitimate (with not inconsiderable social repercussions). In other instances, children were allowed entry while their mother was not and ended up in local authority care when something happened to the father.

In terms of law and policy, the dilemma remains as to whether polygamous marriages ought to be recognized in order to facilitate the protection of the few, or non-recognition ought to remain the basic spirit of the law thereby protecting the rights of the many. It is a dilemma facing policy-makers and the women’s movement world wide (WLUML, 2003). Significantly, the model British Muslim marriage contract currently being debated within sections of the community does not permit polygamy, with its proponents arguing that the community must abide by British law and custom on the matter.

4.1.6 Problems in Recognition of Foreign Divorces: 1971 - 1984

In 1970, the international Convention on the Recognition of Divorces and Legal Separations, The Hague, was introduced precisely to remedy the social problem of 'limping marriages' – those where due to some problem in the recognition of a foreign divorce the status of a marriage is in legal limbo.

Britain was one of the first signatories and enacted the Recognition of Divorces and Legal Separations Act 1971 to bring the 1970 Convention into effect. Sec. 2 enabled recognition of divorces and legal separations obtained overseas through judicial and other proceedings. Sec. 6 continued the application of common law rules for recognition of divorces and legal separation. Various provisions of the 1971 Act were substantially modified by the Domicile and Matrimonial Proceedings Act 1973.

The amendments brought in under the Domicile and Matrimonial Proceedings Act, 1973 were primarily to counter the effect of the decision in *Qureshi v. Qureshi*⁶⁹ in which a *talaq* under the MFLO was pronounced in Britain was declared to be a valid dissolution of marriage between two South Asian Muslims resident in Britain and married in England under civil law. Firstly, any *talaq* on British soil was no longer to be a valid divorce.⁷⁰ Secondly, if the divorce was conducted outside Britain, to be recognized under the strict criteria of the 1973 Act, such a foreign divorce had to have been obtained by means of 'judicial or other proceedings'. However, neither the 1971 Act nor the 1973 Act provided any definition of 'other proceedings' which then continued as a point of conflict in various subsequent judgements. Thirdly, if the foreign divorce was **not** through 'judicial or other proceedings', common law rules on domicile meant an automatic bar to recognition if one of the spouses was domiciled in England or some other country where the divorce was not recognized.⁷¹ The additional restriction on recognition of such a divorce was that both parties should not have been habitually resident in England for 12 months preceding initiation of the divorce.⁷² As noted above, by the 1970s many migrant Muslims from South Asia had acquired English domicile, raising questions about recognition of their divorces.

Moreover, changes to domicile rules were in effect quite restrictive when it came to recognition of a foreign divorce. The Domicile and Matrimonial Proceedings Act 1973⁷³ Sec. 1 ended a wife's automatic acquisition of her husband's domicile ('domicile of dependency by virtue of marriage'); now after marriage a woman could have a domicile different from that of her husband. But this meant that any foreign divorce otherwise than through proceedings now had to undergo a dual test of domiciles, that is the wife's as well as the husband's.

Another main provision of the 1971 Act (that continued to be applied after 1973) came under Section 8(2) which stated that the validity of a divorce or legal separation outside the British Isles may be refused if its recognition would manifestly be contrary to public policy. This provision was used on a number of occasions to refuse recognition to overseas divorces, eg, in the case of *Chaudhary v. Chaudhary*.⁷⁴

However, the changes mentioned in Section 4.1.3 expanding the English courts' jurisdiction to 'habitual residents' also provided an extended jurisdiction by virtue of Sec. 5(5) of the Matrimonial Causes Act 1973 under which the court had jurisdiction to entertain matters ancillary to a divorce or judicial separation. Thus, the rule was that once a case was accepted for hearing, its related matters could also be heard. Despite these positive developments, this only affected divorces or separations being granted by English courts and there was still no provision to grant financial relief after a foreign divorce, annulment, or legal separation. This was only made possible some years later under the Matrimonial and Family Proceedings Act 1984.

During the 1970s and early 1980s an increasing number of cases involving recognition of marriages and divorces (judicial and non-judicial) effected abroad came before the English courts as well as before the immigration authorities, reflecting the changing nature of immigration patterns. It became increasingly clear that the provisions of the existing statutes were inadequate to deal with the issues arising in these cases.⁷⁵ There were conflicting decisions in relation to recognition of extra-judicial Muslim divorce through *talaq*, the main question being what constitutes 'other proceedings' as specified in Sec. 2(a) of the Recognition of Divorces and Legal Separations Act 1971 in the expression 'divorce through judicial and other proceedings'. It was debated whether such proceedings initiated in England and completed in Pakistan could be recognized as 'proceedings' under this Section for a divorce to be legally recognized as an overseas divorce. Another debate was whether acts undertaken by husbands to initiate divorce through *talaq* in India and Pakistani Kashmir, where there is no Muslim statutory law providing for the procedure for divorce, were to be recognized as 'proceedings'. The central debate was whether, even if such divorces were recognized as valid overseas divorces, they were not 'manifestly contrary to public policy'.

4.1.7 Potential Problems for Muslim Divorces in Britain

Two decisions in the summer of 1984 (Chaudhary v. Chaudhary and the Fatima case⁷⁶) generated a great deal of debate in the House of Commons and academic circles. In between these two cases an amendment was proposed by two MPs to the Matrimonial and Family Proceedings Bill which was at the time being debated in Parliament.

The proposed amendment, which was not passed, related to couples who were divorcing under English civil law but who faced a 'barrier to religious remarriage'; in other words, it included those situations where a couple had secured a civil divorce but the husband was refusing an 'Islamic divorce' in order to harass the wife. The two MPs who introduced the amendment told the House of Commons of cases involving extortion by ex-husbands (Carroll, 1985: 226).

There are various reasons why many in the Muslim community emphasise the need for an 'Islamic divorce' via Shariah councils on top of a British civil divorce. In addition to social and emotional factors, they include the mistaken belief that a British civil divorce is somehow not valid in a foreign Muslim system and therefore remarriage may be difficult; and the conservative interpretation that women cannot initiate divorce under Muslim laws and

therefore a *talaq* from the husband is still necessary. Meanwhile, at the state policy level there is a certain confusion of Muslim divorce with the Jewish *gett*, in which a divorce cannot be against the will of the spouse being divorced; this combines with the Muslim community's own conservative interpretation of women's agency in Muslim divorce.

The amendment proposed an addition to Sec. 9 of the Matrimonial Causes Act 1973 which would have given the English courts power to withhold the decree absolute "on the ground that there exists a barrier to the religious remarriage of the applicant which is within the power of the other party to remove." Commentators were happy it was withdrawn (Carroll, 1985:227) given that far from addressing the victimization of women in the Muslim community by their husbands, it could have actually reinforced it.

Unfortunately, a similar provision was recently made law: the Divorce (Religious Marriages) Act 2002, which enables "a court to require the dissolution of a religious marriage before granting a civil divorce." Although the text primarily refers to people "married in accordance with the usages of the Jews" (the law was introduced as a Private Members' Bill by the MP from Hendon, an area with a significant orthodox Jewish population), it also provides for people married under "any other prescribed religious usages and who must cooperate if the marriage is to be dissolved in accordance with those usages." Given the widespread misunderstanding among legal professionals (also encouraged by some conservative sections of the community) that women in Muslim marriages require their husband's permission for divorce, one anticipates attempts by husbands to use this new provision to delay the decree absolute in a woman's civil divorce and insist she go through some 'religious' process. Whereas the new law will ease the situation of Jewish women, it may have the very contrary effect for Muslim women and open the door, as Carroll feared, to even greater exploitation and extortion. Moreover, it may lead to validating the role of Shariah councils within the formal system, a step which women have resisted in other contexts (see Section 8).

4.1.8 Post 1984: New Laws but Problems Remain for Recognition of Foreign Divorces

In September 1984, the Law Commissions in England and Scotland issued a joint White Paper on the ***Recognition of Foreign Nullity Decrees and Related Matters***, which also addressed the issue of simplifying and clarifying the recognition of foreign divorces.⁷⁷

Its recommendations were that there should be a broad and inclusive definition of the term 'proceedings'; that all foreign divorces should be treated through one set of criteria under provisions governing divorce by judicial or other proceedings (ie, the confusing category of divorce 'otherwise than by proceedings' should be done away with); and that the restrictive requirement that to be recognized a divorce other than by proceedings both spouses must not have been habitual residents in Britain for 12 months prior to the divorce. However, not only did the Lord Chancellor reject all of the Law Commissions' recommendations, but he rather made the law more restrictive, as shall be discussed.

Parliament enacted the Family Law Act 1986, which came into force on 4 April 1988. Part II of the 1986 Act repealed the Recognition of Divorces and Legal Separations Act 1971 and various provisions of the Domicile and Matrimonial Proceedings Act 1973. The 1986 Act lays down the rules and conditions for recognition of divorces, annulments and legal separations effected in England and abroad. These rules are exclusive and recognition under common law rules is no longer in operation. The general rule is that recognition is mandatory under Sec. 55 of this Act if the requirements of jurisdiction are satisfied and any statutory ground for denying recognition (under Sec. 51(3)) is not attracted (see below).

A foreign divorce **granted in proceedings** is recognized in Britain if:

- It is effected under the law of the country where it was obtained and at the commencement of those proceedings either party was habitually resident or domiciled in that country or was a national of that country (Sec. 46(1));

A foreign divorce obtained **otherwise than in proceedings** is recognized in Britain if:

- It is effected in the country where it was obtained and at the date it was obtained each party was domiciled there, or one party was domiciled there and the other party was domiciled in a country which recognized the divorce, and in any case neither party was habitually resident in the UK throughout the period of one year immediately preceding the date the divorce was initiated (Sec. 46(2)).

At the same time, a decree may not be recognized if:

- a) In the case of a divorce or legal separation there was no subsisting marriage between the parties (Sec. 51(2));
- b) In the case of a divorce, annulment or legal separation **obtained by means of proceedings**, reasonable steps were not taken to give notice of the proceedings to the other party or the other party was not given a reasonable opportunity of taking part in the proceedings (Sec. 51(3)(a));
- c) In the case of a divorce, etc., obtained **otherwise than by means of proceedings**, there is no official document that the divorce is effective under the law of the country in which it was obtained, or, where either party was domiciled in another country at the relevant date, there is no official document certifying that the divorce, etc., is recognized as valid in that country (Sec. 51(3)(b));
- d) Or in either case its recognition would be manifestly contrary to public policy (Sec. 51(3)(c)).

Under Sec. 51 the court also has discretionary ground to refuse recognition to a divorce on the grounds of *res judicata*.

In brief, ‘transnational *talaq*’⁷⁸ – where a *talaq* is begun and completed in different countries – will not be recognized in Britain, and any divorce carried out on British soil which is not through the civil courts (eg, *talaq* through a Shariah council) is also not valid. However, a Bangladesh or Pakistan divorce involving migrant Muslims who have retained dual nationality and either through the courts under the Dissolution of Muslim Marriages Act, 1939 and/or through the ‘other proceedings’ provided under Sec. 7 and Sec. 8 of the Muslim Family Laws Ordinance, 1961 (see Section 4.2.1) will generally be recognized in Britain (subject to (a), (b) and (d) above). For those such as Indian Muslims and Muslims from Pakistani Kashmir, their legal systems provide for women to divorce through judicial proceedings, but while these systems recognize *talaq* they do not provide for mechanisms to effect *talaq* which can qualify as ‘other proceedings’. The Immigration and Nationality Directorate’s own instructions note that the only means by which a divorce for people from these areas can be recognized is for it to be effected through the courts. This overlooks the fact that in Indian law and Pakistani Kashmir law there is legal provision enabling a man to approach a court for dissolution.

Since their legal systems do not provide for *talaq* through mechanisms which can qualify as ‘other proceedings’ (see Section 4.2.2), to have a *talaq* divorce recognized by the British system Pakistani Kashmiris and Indian Muslims’ only option is to follow the rules of Sec. 46(2) of the Family Law Act 1986, which is next to impossible (as discussed below).

But this summary overlooks the many loopholes that remain and which will ensure litigation and doubts about the validity of foreign divorces under Muslim laws continue. A fuller understanding of the problems with the law and its application requires reference to divorce law in Bangladesh and Pakistan (see Section 4.2.1), and India and Pakistani Kashmir (see Section 4.2.2).

Firstly, despite all the consultations and recommendations that preceded its drafting, the Family Law Act 1986 did not bring in a definition to address the confusion regarding understanding of the term ‘other proceedings’ which has existed in relevant legislation since 1971 and caused immense problems in the case of foreign divorces. While Sec. 2(a) of the Recognition of Divorces and Legal Separations Act 1971 used the phrase ‘judicial or other proceedings’, the 1986 Act throughout uses the simple term ‘proceedings’. But under Sec. 54(1) these are ‘explained’ as follows: “‘proceedings’ means judicial or other proceedings.” Some of the problems unresolved by the 1986 Act are illustrated in the first case study in Section 2 and already outlined in Section 1 under Problem No. 6: Lack of clarity of terms and procedures. When adjudicating on the question of whether or not the foreign divorce was duly ‘through other proceedings’, the law has not clarified whether the English courts’ decisions should be based upon only the text of foreign statutes or alternatively how the foreign system implements these statutes and how a foreign court would decide the case. If one reads in detail three English law cases involving foreign divorce which have very similar facts and situations but very different outcomes,⁷⁹ one begins to question whether these different outcomes were the result of only fractional and entirely chance differences in

the facts of the case. These cases illustrate the need for debate about how it is that minute technical differences, which at the level of daily lives are irrelevant, can have such an huge impact upon legal outcomes and people's happiness.

Secondly, the issue of proceedings and 'transnational *talaq*' remains unresolved. Case law, eg, Chaudhary v. Chaudhary,⁸⁰ holds that in any dissolution of marriage through other proceedings, the proceedings have to take place overseas and as one set of proceedings. Any act which makes the dissolution transnational, ie, some act was initiated from England and part of it occurred in Bangladesh or Pakistan, will mean it will not be recognized as an overseas divorce or 'proceedings' as meant in the statutory law.⁸¹

Circumstances are changing in Pakistan and Bangladesh and various forms of Muslim divorce are being increasingly accessed,⁸² including *mubarat* [divorce through mutual agreement]. Analysis of the problems arising from the application of law in English courts requires some hypothetical illustrations. Although no such cases have yet been reported, *mubarat* is likely to surface as an issue and will face the same problems as an overseas *talaq* or a disputed *talaq* on the grounds of being termed a 'transnational' *talaq* (as in Chaudhary v. Chaudhary).

Mubarat divorce can surface especially in the coming years in cases of alleged forced marriages and that form of arranged marriages where the potential spouses have not met each other and the marriage breaks down in its first year. This is particularly so because of the effect of paragraph 277 of HC 395, as amended by HC 538, a British regulation which states that a spouse who is under 18 cannot sponsor the immigration of the other spouse. In response to this regulation, families are continuing to have their daughters married at age 16 and the process of bringing over the husband is delayed until she is 18; in between the two years the marriage may break down for a variety of causes. One socially and legally viable option for such spouses could be *mubarat*; socially because it will be with the consent of both parties so no public blame is on either family, and legally for obvious reasons of avoiding the legal technicalities and expense of having to go to court. *Mubarat* is to be notified to the local council with a notice or divorce deed having been signed by both parties. If such a notice is forwarded from Britain to a Pakistani council, will not it fall under a transnational divorce where part of the proceedings are taking place in Britain and part in Pakistan?

Let us take another situation where one spouse is in Pakistan and the other in Britain, the two parties somehow come to a settlement of quietly dissolving their marriage through mutual consent, a deed is written in Pakistan, signed by one spouse there and sent to Britain for signature by the other spouse. This other spouse, after putting his/her signature, forwards it to the concerned local council in Pakistan. Suppose that all other restrictions as mentioned in Sec. 46(2) of the Family Law Act 1986 for divorces through other proceedings have been satisfied. But as the proceedings are still technically not in one country, the divorce will not be recognized as an overseas divorce.

Yet another hypothetical situation could be where even if the spouse who signs the deed in Britain does not send it to the concerned local council in Pakistan, but rather returns it to the spouse who signed it in Pakistan, who later on forwards it to the council. This act can also be caught under the technicality of proceedings because without the signature of the spouse who was in Britain there could have been no notice of this to the council and his or her signature in a way can be equated with pronouncement of *talaq* which has taken place in British territory.

While foreign marriages under Muslim laws are now generally recognized for the purposes of matrimonial relief, the British system continues to have a disdainful attitude towards divorce under Muslim laws, as reflected in the Family Law Act 1986 which still makes it extremely difficult for those married under Muslim laws to divorce under that system. (This is not to argue that the British system's disdain is limited to Muslim systems; the 1986 provisions apply to all foreign divorces).

In effect, a foreign divorce will only be recognized when both parties have left English residence for a considerable period of time. This greatly reduces the spouses' options in ways which will not necessarily ensure greater justice. A hypothetical case will illustrate the problems. A Bangladeshi-origin woman born in Britain to second generation migrants, marries under Muslim laws back in Sylhet and brings the husband to live in the UK. After some years, the marriage breaks down, he deserts her and marries another woman in Britain through a *nikah*. The wife's only option is to file for divorce under the British system because she is neither domiciled nor habitually resident in Bangladesh, and although she may have a claim to Bangladesh citizenship this has not been operationalized through her actually obtaining nationality and having a passport. Although her marriage under Muslim laws was recognized by the British system, it is extremely difficult for her to access divorce under these laws even though they may in fact offer her a divorce process that would be less expensive and less drawn out than the British process. This is particularly true if she has the right of *talaq-e-tafweez* [delegated right of divorce] in her *kabinnama* [marriage contract] which is an increasingly popular practice in Bangladesh.

Certainly there is gross social discrimination against women in divorce practices among Muslims in South Asia and in Britain. But it has to be deeply questioned as to whether the current provisions actually offer any protection against negative practices or merely make inaccessible some of the more positive options that may be accessible to some women. The current unsatisfactory situation has been noted by the courts themselves (see Section 7.4 in relation to a case involving a Jewish *gett*).

As for divorces obtained 'otherwise than in proceedings', Sec. 46(2) of the Family Law Act 1986 recognition is even more restrictive because for their divorce to be recognized neither of the spouses had been habitually resident in Britain for the 12 months preceding the divorce. Yet as discussed in Section 4.2.2, this is the only option for *talaq* under Muslim laws in India and Pakistani Kashmir because their laws do not provide for any mechanism which can qualify as 'other proceedings'. Not only this: the second condition introduced in

the Family Law Act 1986 regarding recognition of divorce 'otherwise than in proceedings' relates to obtaining evidence of the divorce (Sec. 51). Any law which bars recognition to undocumented acts will undoubtedly work to women's disadvantage when it interacts with contexts where even such important matters as marriage and divorce remain improperly documented, where women often lack the agency to ensure appropriate documentation, and where courts in their application of law either favour men and conservative interpretations of Muslim laws or the protective spirit of family laws has been undermined by processes of 'Islamization'. It also makes recognition of dissolution by either men or women in Kashmir and India all but impossible, as discussed in Section 4.2.2.

In academic and Law Commission debates prior to the 1986 Act there were conflicting opinions as to whether or not the recommendations in Law Commission Report No. 137 (urging simplification of definitions of 'proceedings') would increase or decrease the burden on administrative officers such as Consular and Registry officials. In the end, the provisions of Sec. 46(2) of the Family Law Act 1986 have increased their burdens in the matter of deciding the recognition of foreign divorces otherwise than through proceedings. The text of the Section requires officials to ascertain and verify the domiciles of both parties, which, as noted in Section 1 Problem No.1(c) can be extremely difficult and open to interpretation. Under Sec. 46(5) a person is regarded as domiciled in a country if either the British system regards them as domiciled there or the law of the country in family matters regards them as domiciled there. Yet Bangladesh and Pakistan law do not refer to 'domicile in family matters' (jurisdiction tends to follow nationality or residence), while India has no specific statute but jurisdiction tends to go on domicile. Moreover, the new provision opens the possibility of conflict in rules regarding domicile. How are officials expected to deal with all these subtleties?

The general implication of the 1986 Act is that foreign systems are somehow slightly barbaric and access is to be all but shut off for those who have settled in Britain. Although the 1986 Act is not limited to foreign divorces under Muslim laws, it certainly completely misunderstands the concept of dissolution in Muslim laws and dismisses the value of the legal systems in countries where Muslim family laws are applied. Perhaps the current law is in part informed by an understanding of the need to protect women in Muslim marriages from instantaneous *talaq* – certainly a practice women's groups in South Asia have locally campaigned against for decades. But in practice the British system's approach ironically accepts a very conservative interpretation of Muslim family law that sees men as somehow superior to women and only men as having agency in marriage.

The present study does not discuss the effect of the Family Law Act 1996 for two reasons. Above all, it does not address the issue of recognition of overseas marriage and divorce as being discussed here. Secondly, Part II of the Act (which deals with divorce) initially came into delayed operation only in pilot form, and in January 2001 it was announced that the government had decided not to proceed to implementation (Cretney & Masson, 2003: 308).

It would be mistaken to assume that legislation since the mid-1980s has solved the problem of inter-country marriages and divorces. The problem is not only that the text of law has remained both restrictive and imprecise. Perhaps more importantly the British system's extremely slow response and piecemeal change has allowed misperceptions and mistaken presumptions about Muslim family laws to continue to dominate the views not only of the British legal system but also the muslim community itself.

4.2 Laws in Bangladesh, India and Pakistan

As the Muslim Family Laws Ordinance, 1961 was introduced before the creation of Bangladesh in 1972 and has largely been left intact by Bangladesh, it applies in both Pakistan and Bangladesh; in 1974 the Muslim Marriages and Divorces (Registration) Act 1974 replaced Sec. 5 of the MFLO although its provisions are very similar. Thus, unless otherwise specified, all references to its application in Pakistan include application in Bangladesh. Similarly, the Dissolution of Muslim Marriages Act, 1939 is applied in Pakistan, Bangladesh and India, with minor differences in application specified where necessary. Wherever different relevant statutes exist in Pakistan and Bangladesh they shall be mentioned separately.

Whereas Indian law has acknowledged the possibility of conflicts of law and provides procedures to address these, Bangladesh and Pakistan law is silent on the matter. In terms of recognition by South Asian countries of British Registry marriages, for Indians the Foreign Marriage Act, 1969 clearly provides for recognition of foreign marriages solemnized under the law of other countries and gives directions about the governance of their affairs in India. Bangladesh and Pakistan do not have an equivalent law, although as discussed below British Registry marriages have been recognized as valid in case law, provided they are not contrary to the Muslim concept of marriage.⁸³ Legislation clarifying this situation would be beneficial for many South Asian Muslims settled in Britain.

4.2.1 Bangladesh and Pakistan: Muslim Family Laws Ordinance, 1961

The laws relevant to Muslim marriages and divorces in Bangladesh and Pakistan are the Muslim Family Laws Ordinance (MFLO), 1961, the Muslim Marriages and Divorces (Registration) Act 1974 (for Bangladesh for registration of marriages only), and the Dissolution of Muslim Marriages Act, 1939 (see Annexe 3 for the text of relevant Sections of the MFLO). The Family Courts are governed by the Family Courts Act, 1964 (Pakistan, which has been substantially amended by the Family Courts Amendment Ordinance, 2002) and Family Courts Ordinance, 1985 (Bangladesh). The Family Courts in both countries are civil courts, and are not confined to hearing cases of Muslims.

The MFLO is an extraterritorial law and applies to all Muslim citizens of Pakistan and Bangladesh wherever they may be, even if only one party to the marriage is a citizen. Compliance is mandatory even if the parties are no longer domiciled or habitually resident in Pakistan or Bangladesh but have retained nationality.⁸⁴

Pakistan Family Courts have jurisdiction to hear a matrimonial case if the cause of action has arisen within its jurisdiction, even if the parties were only staying there temporarily.

The MFLO introduced compulsory procedures through state institutions (judicial as well as administrative) and brought matters of marriage and unilateral *talaq* into the public domain. The law was introduced in 1961 to give effect to the Report of the specially constituted Commission on Family Laws 1955. Its objectives were to propose legislation on marriage and divorce, especially to put a check on hasty dissolution of marriages by men through *talaq* and curtail polygamous marriages.⁸⁵ Under the MFLO, a standard marriage contract was introduced, which among other provisions, has space for the wife to completely restrain the husband from polygamy and/or to curtail the husband's right of *talaq* by imposing conditions.⁸⁶

Under Sec. 5 of the MFLO in Pakistan and Sec. 3 of the MMDRA in Bangladesh, all marriages solemnized under Muslim law are to be registered and failure to follow this compulsory procedure is liable to imprisonment as well as fine. Rules under this law provide the mechanism for when Pakistani Muslims solemnize marriages abroad: in the event the person solemnizing the marriage is not Pakistani (it is the solemnizer's responsibility to register the marriage), then whichever of the parties (groom or bride) is Pakistani, he/she is responsible for the registration of the marriage.⁸⁷ An unregistered marriage may also be registered at any time. However, an unregistered marriage is not invalid and the wife retains all her economic rights, although failure to register may raise doubts about the subsistence of the marriage.

Muslim laws as applied in Pakistan and Bangladesh through both statute and case law do not require any specific form of ceremony for a Muslim marriage and recognize a marriage of Pakistani and Bangladeshi Muslims solemnized under any other system anywhere in the world as long as it is not invalid under Muslim law.⁸⁸ They recognize a civil marriage in Britain under the Marriage Act 1949 as a valid Muslim marriage. However, they do not grant such marriages the status of a monogamous marriage and a Pakistani national husband in such a marriage can contract a subsequent polygamous marriage under Pakistan law following the permission certificate procedures.⁸⁹ Similarly, a Pakistani husband can validly use *talaq* to unilaterally terminate his civil marriage.⁹⁰ Under Pakistan law a Muslim male can contract a valid Muslim marriage with a woman who is either Muslim or *Ahle Kitab* (of the revealed religions);⁹¹ the marriage of a Muslim woman to a non-Muslim is void.⁹²

The law permits polygamy after obtaining a permission certificate from an arbitration council, and any polygamous marriage performed without the permission certificate cannot be registered.⁹³ If either of the parties is aggrieved by the decision of the arbitration council they have a right to have the decision revised by the District Collector. A polygamous marriage contracted in violation of the permission requirements is not invalid. However, on a complaint either by the existing wife or by the subsequent wife (if she has been deceived about the factum of the husband's existing marriage), the husband can be punished with imprisonment or fine, or both.⁹⁴ The existing wife can also seek dissolution of her marriage on the grounds that her husband has contracted another marriage without seeking a permission certificate from the arbitration council, while retaining all her rights to dower.⁹⁵ A wife who is not treated equitably in a polygamous marriage may also seek dissolution of the marriage.⁹⁶

Under Pakistan law, dissolution of marriage can take place through judicial proceedings as well as through other non-judicial processes and proceedings. The marriage can be dissolved through non-judicial proceedings when the husband accesses the unilateral right of *talaq*, or the wife accesses *talaq-e-tafweez* [the delegated right of *talaq*], or the couple agrees to dissolve their marriage through mutual consent (*mubarat*). There are additionally a number of less well-known grounds under the Dissolution of Muslim Marriages Act, 1939 (DMMA) for women to access divorce, even without the intervention of the court in the form of judicial proceedings. For divorces not through the court, the party (in the case of *talaq*) or parties (in the case of *mubarat*) merely have to notify the local council in writing. The council is obliged to accept the notice and attempt reconciliation between the parties. However, if the reconciliation efforts fail, or the party/parties which notified the council does/do not revoke the notice, dissolution of marriage in the form of *talaq*, delegated *talaq*, or *mubarat* becomes effective 90 days after the council receives the notice.⁹⁷

If the wife does not access delegated *talaq* or *mubarat*, to dissolve her marriage she has to go through judicial proceedings by petitioning for dissolution on any of the grounds available under the Dissolution of Muslim Marriages Act, 1939. In such a case, the court has authority to grant dissolution or not irrespective of the husband agreeing or not to such a dissolution. If the court grants a decree of dissolution of marriage it is comparable to a decree nisi. The decree of dissolution is then to be sent from the court to the local council for arbitration and reconciliation proceedings. The decree becomes absolute once these other proceedings are completed or 90 days have passed from the date that the court decree is received by the local council. Technically, at the time the court decree is granted, the marriage still subsists and effect of the decree can be nullified if the two parties reconcile within 90 days of the decree having been sent to the local council. Though the law requires the Family Court to forward the decree to the local council within 7 days of its being granted, in practice this process often does not happen. The laws governing the Family Courts and MFLO are silent about the consequences in the event that such a decree is not forwarded. To avoid any such complications, Pakistan's superior courts have held, "The Family Courts would continue to follow the practice of sending a copy of the decree to the chairman concerned

but at the same time it is also necessary for the wife in whose favour the decree is passed, to independently inform the chairman about the decree as also to send a notice thereof to the husband in a formal manner.⁹⁸

If one reads the relevant Bangladesh and Pakistan law carefully,⁹⁹ then a woman's divorce through the courts in Pakistan or Bangladesh could be called a decree through judicial **and** other proceedings because after obtaining the court decree she has to go through another set of 'proceedings', which are the same process as for registration and finalisation of *talaq*.

In terms of divorces initiated by men, there has long been a debate, especially in Pakistan, about the validity of customary oral *talaq* or *talaq/mubarat* which was written but not notified to the local council. Sec. 7 of the MFLO does not explicitly state that a *talaq* which is in violation of its procedure will be held invalid. However, apart from a few exceptional circumstances, under case law compliance with Sec. 7 has been held compulsory and *talaqs* which did not follow the procedure were held as never having taken place.¹⁰⁰ Exceptions where dissolutions have been held valid even though the husband did not follow the required procedure, have been allowed when there was clear evidence he had either pronounced *talaq* orally or through a written deed. For example, men whose former wives have remarried after oral *talaq* have claimed that since the required procedure under Sec. 7 was not followed, the *talaq* was not valid and thus their 'wife' is guilty of *zina* under the infamous Hudood Ordinances 1979 which covers all sex outside a valid marriage including adultery and bigamy. In such cases, especially where the subsequent marriage remained unchallenged for a clear period of time, courts have accepted that the first marriage was duly dissolved and acquitted the woman and her second husband from criminal liabilities.¹⁰¹ Strict application of Sec. 7 has also been relaxed in cases where the couple were illiterate and court felt they were not familiar with the legal requirements.¹⁰²

From the above it can be seen that a developed body of statutory law supplemented by case law exists in Pakistan and Bangladesh. This is a body of law and is neither a collection of customs nor just traditional Muslim jurisprudential principles. This is certainly unnoticed by the British courts and policy makers who still either tend to insist on a pedantic reading of the MFLO without regard to case law or who dismiss statutory law merely as customs or people's practices.

4.2.2 Laws in India and Kashmir

In Pakistani Kashmir (known in Pakistan as Azad Jammu & Kashmir, AJK) and India, Muslim family laws are not necessarily all applied through statutory enactments. However, women can approach Family Courts for divorce under the Dissolution of Muslim Marriages Act, 1939, applicable in both India and AJK.

Because of the absence of codified provisions regulating *talaq*, procedure has been developed purely through case law, at least in India.¹⁰³ Until the more visible rise of identity politics in India in the 1980s, case law was reasonably stable. It was established that a male

Muslim of sound mind who has attained puberty may divorce his wife orally or through a written *talaqnama*, without assigning any cause and without intervention from the court or other formal state institution. In other words, no 'procedures' need be involved.

However, more recent developments may have complicated matters in relation to recognition of Indian Muslim divorces in the British courts. On the one hand, Hindu fundamentalist forces sought to use the example of Indian Muslim women's oppression due to arbitrary *talaq* as a means of attacking the Muslim community for its 'backwardness' while right-wing forces within the minority community reacted by claiming oral *talaq* as a practice to be defended in the name of 'cultural identity'. Meanwhile, Indian Muslim women's groups continued to raise concerns about the arbitrary nature of *talaq* and the violations of women's right that it leads to.

Ultimately, the more recent trend has been to assert that *talaq* is not an unfettered right of Muslim husbands,¹⁰⁴ much to the horror of the reactionary All India Muslim Personal Law Board. Citing provisions in the Civil Procedure Code and Indian Evidence Act, a three-member Mumbai High Court bench in an 88-page verdict in 2002 held that Muslim laws prescribe that a process of reconciliation should precede divorce, without which a *talaq* is invalid. The Court also observed that a mere pronouncement of *talaq* by the husband, or a mere declaration of his intention, or his acts of having pronounced *talaq* were not sufficient unless the *talaq* was "proved through documentation/registration under Wakf Act". The verdict further said that Muslim men have no absolute right to divorce and the husband cannot declare his intentions in the absence of the wife.¹⁰⁵ However, as a federal country, case law in one state's High Court can be said not to apply in other Indian states and there is still no Union-wide statutory mechanism for dissolution of Muslim marriage. The 1880 Qazis Act which provided for the appointment of officials for marriage and divorce still applies in several Indian states but has not been made full use of either by the Indian state or Indian Muslim communities.

Under the Family Law Act 1986, the official document which would prove a divorce to the satisfaction of the law is defined under Sec. 51(4) as one "issued by a person or body appointed or recognized for the purpose in the foreign country." In practice this means non-recognition of *talaq* executed in countries where there is no statutory requirement or procedure for *talaq* eg, Pakistani Kashmir and India. When there is no statutory procedure available that obviously means the absence of any official or body to issue such documents. The only official forums in these instances are the civil courts which have jurisdiction on matrimonial issues but they only issue certificates or declarations in cases appearing before them.

For Muslims from Pakistani Kashmir divorcing through *talaq*, on the face of it the only way out is to file a jactitation petition (through collusion) before a civil court and seek a declaration that the marriage stands dissolved because of divorce through *talaq* having been effective on a previous date. Possibly, such an exercise of approaching a court and issuance of a relevant court decree may satisfy the requirements of recognition of such a divorce under British law.¹⁰⁶

4.3 European and International Law

Britain is bound both by the European Convention on Human Rights (which is reflected in Britain's Human Rights Act 1998) and the ratified UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The current conflicts of laws and obstructions to the recognition of Muslim marriages and divorces which weigh particularly heavily on women can easily be argued to be in violation of these instruments.

For example, under Article 13 of the European Convention, everyone whose rights and freedoms set forth in the Convention (including the right to marry and found a family) are violated "shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Moreover, under Article 14 the enjoyment of the rights and freedoms set forth in the Convention "shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." This right is mirrored in Article 14 of the UK's Human Rights Act 1998.

CEDAW similarly provides for women's equality with men before the law (Article 15) and that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; and (c) The same rights and responsibilities during marriage and at its dissolution (Article 16).

Endnotes

⁴⁵R. v. Immigration Appeal Tribunal and Another, ex-parte Secretary of State for Home Department and Other Applicants [1984]1 All E.R. 488

⁴⁶English civil marriages are recognized as valid in Pakistan.

⁴⁷R. v. Immigration Appeal Tribunal and Another (at 494)

⁴⁸For a discussion of the evolution of Muslim personal law in South Asia, and specifically the creation of parallel judicial systems, see Arif, 1998. For a feminist critique on the role of the colonial state in personal law legislation in India, see Nair, 1996.

⁴⁹'Matrimonial relief' is defined in Sec. 1 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972

⁵⁰See the parameters for establishing domicile and general rules on domicile under common law in North & Fawcett, 1992: 140-142

⁵¹Lawrence v. Lawrence (1985) Family 106 (at 132)

⁵²Lord v. Colvin (1859) 4 Drew 376, quoted in North & Fawcett, 1992: 147

⁵³As in Qureshi v. Qureshi [1971]1 All E.R. 325 where jurisdiction was granted to a Pakistani domiciled couple who had a civil marriage in England.

⁵⁴Hyde v. Hyde [1866] LR 1 P&D 130

⁵⁵Though under common law rules, courts did have inherent jurisdiction.

⁵⁶Muhammad v. Suna 1956 S.C. 366, 370, quoted in Law Commission, 42: 10

⁵⁷This is not to ignore the individual efforts made by some MPs discussed in Section 4.1.7

- ⁵⁸Law Commission, 42: para 35 summarized the reasons needed for abolishing the Hyde v. Hyde rule following the Report's lengthy discussion of all the issues.
- ⁵⁹This was discussed in depth in Sulaiman v. Juffali, Unreported, Family Division of the High Court, Munby J., 9 November 2001
- ⁶⁰Barnet London Borough Council v. Shah [1983]2 AC 309
- ⁶¹Kapur v. Kapur [1984] FLR 920 at p. 926
- ⁶²Ali v. Ali [1966]1 All E.R. 664
- ⁶³Radwan v. Radwan [1972]3 All E.R. 967
- ⁶⁴Also Scottish Law Commission Report No. 96
- ⁶⁵Lawrence v. Lawrence [1985]1 All E.R. 506 and on appeal at [1985]2 All E.R. 733.
- ⁶⁶Hussain v. Hussain [1982]3 All E.R. 369 (at 372d)
- ⁶⁷Under the 1973 Matrimonial Causes Act, the date after which marriages of an English domiciliary under a system permitting polygamy were void.
- ⁶⁸Although in some matters today actually polygamous marriages can seek relief from the English courts, precisely which matters remains a highly complex and uncertain area. The proposed legislation would have ended this complexity.
- ⁶⁹Qureshi v. Qureshi [1971]1 All E.R. 325
- ⁷⁰Until the 1973 amendments, consular officers at the Pakistan Embassy in Britain performed the function of the Arbitration Council and processed *talaqs* and other Muslim divorces under the MFLO, as happened in the Qureshi *talaq*. The restrictions introduced by the British system themselves are a contributing factor in the rise of transnational *talaqs* where there is now no such function performed by the Pakistan Embassy.
- ⁷¹Sec. 2 of the Domicile and Matrimonial Proceedings Act 1973, which substituted Sec. 6 of the 1971 Act, continued to preserve the common law rules.
- ⁷²Sec. 16(2) of the Domicile and Matrimonial Proceedings Act 1973
- ⁷³Which came into effect on 1 January 1974
- ⁷⁴Chaudary v. Chaudhary [1984]3 All E.R. 1017
- ⁷⁵See for example Quazi v. Quazi [1979]3 All E.R. 897; Radwan v. Radwan [1972]3 All E.R. 967; Chaudary v. Chaudhary [1984]3 All E.R. 1017; R. v. Immigration Appeal Tribunal and Another, ex-parte Secretary of State for the Home Department and Other Applications [1984]1 All E.R. 488; R. v. Registrar General, ex p. Minhas [1977] Q.B. 1.
- ⁷⁶Chaudary v. Chaudhary, [1984]3 All E.R. 1017; R. v. Immigration Appeal Tribunal and Another, ex-parte Secretary of State for Home Department and Other Applicants [1984]1 All E.R. 488
- ⁷⁷The Report drew extensively from an analysis of Chaudary v. Chaudhary and Viswalingam v. Viswalingam [1979] Part 1 Case 14 [CAEW], the latter involving dissolution of marriage under the law of Malaysia and the husband's conversion from Hinduism to Islam.
- ⁷⁸and thereby also supposedly divorce through *mubarat*.
- ⁷⁹Mirza Waheed Baig v. Entry Clearance Officer, Immigration Appeal Tribunal [2002] UKIAT 04229 Appeal No. TH/05142/2000; A-M v. A-M [2001] 2 FLR 6; Wicken v. Wicken, Unreported Transcripts (Smith Bernal), Family Division, 27 April 1998, Holman J. In all three cases it was debated whether the divorce was valid according to the laws of the country where it was obtained, and also whether the English courts would recognize such a divorce.
- ⁸⁰Chaudary v. Chaudhary [1984]3 All E.R. 1017
- ⁸¹At the time of this decision, Recognition of Divorces and Legal Separations Act 1971 as amended by the Domicile and Matrimonial Proceedings Act 1973 was still in operation, and as the 1986 Act has not given a statutory definition for the term 'other proceedings', it is presumed that earlier case law on the issue will hold ground.
- ⁸²See Shaheed et al, 1998, and Kamal, 2000 for details of women's changing social status and related family law issues.
- ⁸³The question remains as to what would be the status of, for example, a British Muslim woman of Pakistani origin who married a non-Muslim in a civil registry marriage, since such a marriage is not valid under Pakistan law.
- ⁸⁴Sec. 1(2) MFLO: "this law applies to all Muslim citizens of Pakistan, wherever they may be." Rule 12(2) under this law provides a mechanism for the registration of marriages solemnised abroad when one of the parties to the marriage is a Pakistani Muslim. This was explained in Farah Khan v. Tahir Hamid Khan 1998 MLD 85 (Lahore), at p. 89
- ⁸⁵Report of the Commission known as the Rashid Commission, 1955. The objectives of the law were discussed in Syed Ali Nawaz Gardezi v. Col. Muhammad Yusuf PLD 1963 SC 51.

- ⁸⁶The standard marriage contract applicable in Bangladesh and Pakistan was introduced under Rules 8, 10 and 12 of the Muslim Family Law Rules 1961. Clause 17 permits the couple to agree to any 'special conditions' to the marriage, which can include ensuring the marriage remains monogamous. Clause 18 provides for the delegated right of *talaq* (*talaq-e-tafweez*) whereby the husband grants the wife exactly the same powers of *talaq* as he has under law. Clause 19 asks: "Whether the husband's right of *talaq* in any way curtailed?" While the right cannot be withdrawn in totality, it can be curtailed for a period of time, or monetary compensation can be made due to the wife, or provision for post-divorce maintenance can be imposed.
- ⁸⁷Rule 12 under the MFLO provides that the marriage form be filled and delivered to the consular officer of Pakistan in or for the country in which marriage is solemnised for onward transmission to be registered with the Nikah Registrar (marriage registrar) in Pakistan.
- ⁸⁸For a detailed discussion on this issue, see *Jatoi v. Jatoi* PLD 1967 SC 580.
- ⁸⁹*Fauzia Hussain v. Mian Khadim Hussain* 1985 NLR Cr 202, at p. 209. In this case, a registry marriage was contracted in Britain. The husband subsequently contracted a polygamous marriage in Pakistan and the wife filed a complaint against him for not following the permission certificate procedure. The court rejected husband's plea that his first marriage was not a valid Muslim marriage. Following *Jatoi v. Jatoi*, it was declared a valid Muslim marriage and held that for a subsequent marriage the requirements of Pakistan law were mandatory.
- ⁹⁰*Jatoi v. Jatoi* PLD 1967 SC 580
- ⁹¹*Syed Ali Nawaz Gardezi v. Col. Muhammad Yusuf* PLD 1967 SC 51; *Mrs. C. M. Samuel v. Mr. Samuel and The State* PLD 1967 SC 334
- ⁹²*Muhammad Ishaq Yaqoob v. Umrao Charlie and Another* 1987 CLC 410 at p. 411
- ⁹³Sec. 6 MFLO and Rule 14 under this law. The rule allows the arbitration council (consisting of the chairman of the local council, one representative of the wife and one of the husband who has applied for permission certificate) to grant a permission certificate if it considers the proposed polygamous marriage to be just and necessary. Grounds mentioned in the rule for consideration of application are sterility, physical infirmity, physical unfitness for the conjugal relations, wilful avoidance of decree of conjugal rights or insanity on the part of existing wife.
- ⁹⁴Sec. 6(5)(b) of the MFLO, see Annexe 3. Under Rule 21 of the Rules under the MFLO, existing or subsequent wife or any other aggrieved person can file a complaint against a polygamous marriage.
- ⁹⁵Sec. 2(ii-a) of the Dissolution of Muslim Marriages Act, 1939 as applied in Bangladesh and Pakistan
- ⁹⁶Sec. 2(f) of the Dissolution of Muslim Marriages Act, 1939
- ⁹⁷Sec. 7 and 8 of the MFLO; see Annexe 3
- ⁹⁸*Muhammad Ishaque v. Chaudhry Ahsan Ahmad* PLD 1975 Lahore 1118
- ⁹⁹Sec. 8 of the MFLO, read with Sec. 21 of the Family Courts Act 1964 for Pakistan or for Bangladesh Sec. 8 of the MFLO read with Sec. 23(2) & (3) of the Family Courts Ordinance 1985 which is almost a ditto copy of the Pakistan Act.
- ¹⁰⁰*Syed Ali Nawaz Gardezi v. Col. Muhammad Yusuf* PLD 1963 SC 51
- ¹⁰¹For details, see *Warraich and Balchin*, 1998.
- ¹⁰²*Nur Khan v. Haq Nawaz* PLD 1982 FSC 265
- ¹⁰³For a detailed discussion, see WLJML, forthcoming 2006
- ¹⁰⁴Criminal Writ Petition No. 94 of 2000
- ¹⁰⁵www1.timesofindia.indiatimes.com/cms.dll/articleshow?art_Id=9307529
- ¹⁰⁶It is an open-ended question as to whether this would be recognized as a divorce through judicial or 'other proceedings', especially since the Family Law Act 1986 abolished the right to petition for jactitation of marriage.

Section 5 Future Trends

Conflicts of laws and violations of rights due to the non-recognition of Muslim marriages and divorces will undoubtedly worsen in years to come. Whereas the rising proportion of British Pakistanis and Bangladeshis and changing social attitudes may lead to a fall in the incidence of forced marriages and transnational marriages, this does not alter the fact that there will continue to be very many British citizens who are also subject to the family laws of another country. Nationality law in Bangladesh and Pakistan, for example, does not place any generational limits on nationality through descent no matter how many generations are born outside the country.

Due to different patterns of migration, British Pakistanis are now reaching marriageable age in large numbers, while Bangladeshis will reach this point in perhaps a decade and will probably exceed Pakistanis during the next five to ten years (Samad & Eade, 2002: 55).

Meanwhile, travel to South Asia is becoming more frequent as migrant families become more financially stable and air travel more accessible. Although the divorce rate among British Asians is lower than the national average, it is acknowledged that marital difficulties are a growing problem (see Section 3.2.3). Added to these factors are women's greater willingness and determination to seek legal remedy for their rights through the British courts and the contrary attempt to keep costs low by pursuing action through foreign courts, as well as men's apparently increasing willingness to exploit conflicts of law.

At the same time, changes in the conceptualisation of the Foreign Commonwealth Office's consular services may lead to an increasing acceptance of High Commission staff's responsibilities in the area of foreign marriages and divorces. FCO documents now speak in terms of 'clients' and provision of 'services' (FCO, 2004). Combined with possible obligations under the Human Rights Act 1998 (of which consular officials were aware), there is undoubtedly more room for demanding positive change in the way Entry Clearance Officers, for example, process applications which involve a foreign marriage or divorce. On the other hand, a resources crunch may be used to argue against needed capacity-building of FCO and Home Office staff.

At a wider level, the move away from oral traditions as the prime source of religious information (Samad & Eade, 2002) can have two, opposing, effects which may impact on the levels of unregistered Muslim marriages and divorces. On the one hand, younger generation Muslims are more likely to research their rights and responsibilities for themselves, widening the scope of sources which may influence them. Hence today's remarkably vibrant European and North American based Internet scene in which thousands of sites exist providing information about Islam and the role of women in Islam, etc. – all of which are clearly targeted towards youth. In contrast to the ethno-centric vision in most mosques dominated by a vernacular-speaking *imam*, these websites are in English. Some mosques have articulated a clear recognition of the need to have English-speaking *imams* in order to keep the younger generation interested (Geaves, 1996: 169).

But on the other hand, there is a virtual monopoly of the interpretation of Islam, Muslim laws and women's rights within Islam by the extreme Right and conservative Right, the latter often masquerading as 'moderates' having co-opted the language of human rights. This information about Islam that dominates the Internet speaks in absolutes and comes without an accompanying cultural context as if Islam has ever existed in a cultural vacuum. It then becomes possible to talk of 'Shariah' as some homogenous body of rules (although this is disproved by the very existence of different sects even within Sunni Islam). While some of the more 'moderate' sites and web-scholars such as Tariq Ramadan talk of 'European Islam' and are careful to add a contextual gloss to their writings, the underlying message is that there remain a single set of 'true' Muslim practices and 'proper' ways of living as a Muslim.¹⁰⁷

Enquiring youngsters who push the boundaries or who seek their own understandings of faith and fresh interpretations of Islam are faced with being discredited as not being 'authentic'. They are certainly excluded from policy input and yet it is they who will be most affected by conflicts of laws issues in the coming years.

Endnote

¹⁰⁷ Just as the word 'democracy' can mean many things to many people, Muslims do not dispute the principles of Islam; the question is how these are to be put into daily practice and what vision of human society is the outcome of these principles.

6.1 Family Law Matters Overlooked or Compartmentalized

Discrimination law and discourse in Britain – as elsewhere globally - has overwhelmingly focused on 'public' issues such as education, health and employment. The role of the state in preventing and redressing discrimination by non-state actors within communities is still a controversial subject in human rights debates.

Reflecting this 'public' focus, many major studies of the Muslim community's status (for example, Anwar, 1996) have never looked at family laws as an issue – whether examining the state's role in issues such as conflicts of law, or gender discriminatory customary practices within families. Even some studies by women of the education and employment problems facing women in the Muslim community do not seem to have explicitly discussed marriage and divorce practices as a possible factor behind, for example, the 'disappearance' from the school rolls of 370 girls in the 13-18 age group per 1000 boys (Jawad, 2003: 2) or them finding it harder than non-Muslim peers to achieve their career goals (Jawad, 2003: 3). Meanwhile policy consultations have focused on issues such as the reproductive health and housing needs of Muslims but not on family law.

There are, however, exceptions which have examined family relations (for example, Ballard, 1994; Samad & Eade, 2002) and to a more limited extent the role of the British state in promoting or obstructing the rights of women in Muslim communities (Husan, 2003). Overall, writings on Muslim women in Britain have been either sociological or anthropological and focused on generalisations rather than the specific issue of family laws. Only a couple of studies have examined marriage and divorce (Shah, 2002a; Shah, 2002b; Shah-Kazemi, 2001; Bano, 2000¹⁰⁸). At the same time, legal studies of Muslim family law in Britain (Carroll; Menski; Pearl and Poulter – see bibliography) have generally focused on the minutiae of legal provisions rather than the social effects the statute and its implementation by the British courts has on women's lives.

Rather than this compartmentalized an approach, what is needed are studies that combine examination of the text and implementation of law, with sociological and political analysis (as in, for example, Shah, 2002a and 2002b). This is vital for a fuller understanding of - and solution to - the rights violations being experienced by women in the Muslim community in the field of inter-country cases.

6.2 "In Islam", 'Islamic Law' and 'Classical Law'

6.2.1 Homogenising Islam and Overlooking Statutory Laws

Finding appropriate policy, legal, and social solutions to the violation of Muslim women's rights in family laws in Britain has been hampered by flaws in previous research and writings. All too often, phrases have been used such as "In Islam, men have the right...while women..." (Jawad, 2003: 7, citing Shah-Kazemi, 2001). This overlooks the basic fact that Muslims in

Britain are subject to statutory laws. This is sometimes only British law, and therefore at least in terms of their legal rights, what Islam (or more accurately 'Muslim laws') does nor does not say about the spouses' rights is irrelevant (whether one approves of this situation or not).

But in the case of dual nationals or those with a foreign spouse, they are often equally subject to the statutory laws of other countries. In the case of Bangladesh and Pakistan, these laws are explicitly framed with reference to Islam and are extraterritorial (see Section 4.2). It is thus not some undefined and (erroneously presumed to be homogenous) 'Islam' or 'Shariah' which applies to them but the specific provisions of the Muslim Family Laws Ordinance, 1961. Tunisia, Pakistan and Saudi Arabia all have family laws or provisions which are said to be Muslim laws, and yet in the first polygamy is banned outright following a progressive interpretation of Qur'anic provisions, in the second polygamy is subject to certain conditions, while it is virtually unregulated in the latter. This illustrates the futility of nebulously discussing 'Islam' rather than understanding statutory laws when trying to understand women's rights in the family in Muslim contexts.

The flaw here is to conflate social attitudes and political visions (the latter discussed in Sections 7.1 and 7.2) with law. No doubt people may feel themselves to be morally bound by an interpretation of Muslim laws which differs from the statutory facts. But when trying to help those affected by conflicts of laws, it is vital to distinguish between fact and feelings.

6.2.2 Islamic Law or Muslim laws?

It is similarly inappropriate to use the term 'Islamic Law', with the capitals implying some form of monolithic codification that accords with the injunctions of Islam. Statutory laws in Muslim countries are extremely diverse, reflecting the diversity of interpretations of the Qur'an and Sunnah. What we are in fact talking about are the laws (plural) of Muslims. Moreover, as Lucy Carroll puts it, "In the modern world Islamic law, as law, does not exist as some disembodied entity floating in the stratosphere, overreaching national boundaries and superseding national law. In the modern world, Islamic law exists only within the context of a nation state; and within the boundaries of any particular state it is only enforced and enforceable to the extent that, and subject to the reforms and modifications that, the nation state decrees." (Carroll, 1997: 105)

A natural conclusion of the term 'Islamic Law' is that the statutory laws of Muslim countries which vary from this supposedly monolithic 'Islamic Law' are then implicitly 'unIslamic'. This is indeed the position taken by obscurantist and right-wing religious parties in Pakistan and Bangladesh regarding the Muslim Family Laws Ordinance, 1961 (WLUML, 2006 forthcoming). For example, "One central aspect of the MLSC's [Muslim Law Shariah Council] work is the ability to facilitate a divorce according to Islamic Law, and to act in the capacity of a Qadi and function as he would do in an Islamic court of law." (Shah-Kazemi, 2001:10). This statement overlooks the point that both the divorce provisions and procedure applied by the Shariah councils do not match Bangladesh and Pakistan law. For example, to date there is no female decision-making member of a Shariah council in Britain yet women are Family Court and High Court judges in both Bangladesh and Pakistan; courts in these countries will not even

attempt to obtain the husband's permission for *khula* as case law firmly established as far back as 1959¹⁰⁹ that this is not required.¹¹⁰ When challenged at a public meeting on Marriage & Divorce in Islamic Law: Implications for Muslim Women and Children Experiencing Domestic Violence in May 2004, that the Pakistan courts indeed recognize a British civil divorce as valid between Muslims, the President of the Islamic Sharia Council, Maulana Abu Sayeed, spoke out against "man-made law". This could have been construed to imply that whereas the Shariah councils apply divine law and are above *man*-made patriarchal interpretations, the Pakistan courts are godless. This is a position shared by only a few on the extreme Right in Pakistan but appears more widespread in Britain. For example, Shah-Kazemi, 2001 asserts that "jurists (*fuqaha*) do not recognize the civil divorce as ending the *nikah* contract", apparently unaware of the reality that Pakistan's courts for example do recognize British civil divorce as perfectly valid between Muslims.

6.2.3 'Classical Law' – a Term of Questionable Usefulness

Pearl & Menski have used three terms in their submissions to courts and in their writings. These are 'classical Shariah law', 'classical Sunni law', and 'classical Hanafi law'. But one has to examine what these terms mean in the context of Muslim law as applied in the South Asian countries under discussion, specifically Bangladesh and Pakistan where family law is codified.

We have already discussed the dangers of using the homogenising term 'Shariah law' or 'Islamic Law' to cover the extremely diverse interpretations Muslim jurisprudence and laws being followed in various countries. Similarly, the term 'classical Sunni law' forgets that there are four major Sunni schools: Hanafi (dominant in South Asia), Maliki, Shafi and Hanbali. On the question of *talaq* there are major differences. Only Hanafi jurists permit instant termination of marriage in the form of pronouncement of *talaq* three times in one sitting, and without the possibility of revocation.

But 'classical Hanafi law' is also of questionable use as a term to discuss marriage and divorce in (majority Hanafi) South Asia today. The Dissolution of Muslim Marriages Act, 1939 provides nine categories of grounds for women to seek judicial divorce and is a major departure from most traditional Hanafi interpretations in which there are almost negligible options for a woman to dissolve her marriage on her own initiative. Hanafi scholars in (then united) India agreed with the provisions of the new law even though they were primarily adopted from Maliki law. Indeed, reforms in 'classical Hanafi law' began even earlier than this, being introduced in the Ottoman Empire in 1915 (Carroll, 1997: 101).

A further departure from Hanafi law came with the MFLO, especially Sec. 7 relating to *talaq*, which is not based on any one of the four Sunni schools. First, the MFLO makes *talaq* revocable irrespective of the manner or the form in which it is pronounced; second, it keeps the marriage intact for a full period of 90 days after notice of *talaq* is served on the local council; third, it does not require the abhorrent practice of *hilala*¹¹¹ after the *talaq* has become effective under the MFLO. Around the period when the MFLO was being formulated, Pakistani superior courts also began establishing clear departures from traditional

jurisprudential positions, asserting that they were not bound by the opinions of the jurists in interpretation of Muslim law¹¹² and that a measure of *ijtihad* [independent reasoning] was necessary to meet contemporary needs. Discussion about the position of *talaq* in Hanafi law subsequently came before the superior courts on several occasions but statutory provisions were applied.¹¹³ Soon after its constitution, Pakistan's Federal Shariat Court (FSC) in 1980 declared that the language of the constitutional provisions which created the FSC "does not warrant any attempts at harmonising the laws with jurisprudence of any particular school of thought or sect," and that it "cannot blindly follow the doctrines (*fiqh*) of a particular sect."¹¹⁴ Thus to talk of any 'classical' law or even 'Hanafi law' in the context of at least Bangladesh and Pakistan is misleading.

6.3 Limited Knowledge of Muslim Laws and Statutory Provisions in Muslim Countries

While often rich in sociological detail and in contrast to the lack of sociological observation in the (largely male) academic analysis of Muslim laws in Britain, analysis to date by British women researchers of women's rights in Muslim family laws has also shown a lack of awareness of feminist and women's analysis of these issues in wider Muslim contexts – both analysis from within a faith framework as well as secular analysis. This is less a reflection of the capacity of individual researchers and more a result of the overall isolation of the Muslim community in Britain from progressive global movements, including both women's movements in other Muslim contexts and the extraordinary developments in progressive Muslim theology taking place elsewhere.

While it is to be applauded that women from a Muslim background have written the few studies on the subject – and this must remain the case – it would be a mistake verging on racist essentialisation to presume that cultural background equates with expertise in Muslim jurisprudence and statutory laws in other Muslim contexts.

Most worrying is the lack of knowledge about various forms of Muslim divorce available to women since classical times. Studies (Shah-Kazemi, 2001: 7-8) fail to mention or accurately describe *talaq-e-tafwid* [the right of *talaq* delegated by the husband to the wife] and *mubarat*, the latter being a completely no-fault, mutual-dislike option which predates the modern 'marital breakdown' concept by centuries. Statements such as "women are unable to obtain a *talaq* divorce from their husbands," are jurisprudentially inaccurate. If the husband initiates the divorce, it is either *talaq* or (if mutually agreed) *mubarat*, but if the wife initiates the divorce it is either a *talaq-e-tafwid*, *mubarat*, *faskh* [dissolution on the grounds of some fault] or *khula* (discussed below), but cannot be a *talaq*. The confusion in such statements derives from the highly patriarchal interpretations of Muslim jurisprudence codified in some Muslim laws whereby *khula* requires the husband's permission. But even these conservative codes ultimately grant the courts the right to dissolve a marriage where a fault is established on the part of the husband – 'obtaining a *talaq*' from the husband simply doesn't arise; many Middle Eastern codes also provide for a court to dissolve the marriage (on application by either party) in the event of *niza'a wa shiqauq* [discord and strife, similar to the concept of marital

breakdown]. Thus statements from the Shariah councils and replicated in such studies that “ideally the husband himself should pronounce *talaq*” are based upon a highly conservative interpretation of Muslim laws that is virtually non-existent in practice in Muslim laws as applied in modern Muslim contexts and merely reinforces erroneous presumptions about women’s lack of legal autonomy in Muslim laws. Courts in Bangladesh, Egypt, Malaysia and Pakistan for example have moved on from the antiquated view that divorce is a male prerogative precisely because it has been so abused by male authority. One only has to note the two to three year process often required by Shariah councils to complete a divorce by insisting upon the husband’s agreement.

Inaccurate and outdated understandings of forms of divorce initiated by women in Muslim laws are not limited to the Shariah councils and researchers who base writings on their opinions. The British courts too, informed by supposedly expert lawyers, continue to misconstrue women’s right to dissolve their marriage under Muslim laws. This is especially true for the concept of *khula* and its application in Bangladesh and Pakistan,¹¹⁵ as seen in the case of *Quazi v. Quazi*¹¹⁶ in which the husband petitioned for recognition of his divorce either on the grounds of *khula* divorce which the couple obtained some years earlier, or on the basis of a subsequent *talaq* which took place in Pakistan. The court did not pronounce any verdict on the *khula* divorce – as if it were simply an irrelevance; this reveals ignorance about the widespread prevalence of *khula* in Pakistan. *Khula* was also mentioned in this case as ‘a divorce through mutual consent’. In Bangladesh and Pakistan, *khula* is a form of divorce which is granted by the court on the initiation of the woman; it is for the court to grant it or refuse it according to the circumstances of the case. There is no question of mutual consent. The court can grant *khula* whether the husband agrees to it or not.¹¹⁷ This is quite distinct from divorce through mutual consent [*mubarat*] which can be on the initiation of either party.¹¹⁸

6.4 The Role of Expert Opinions

It is a settled rule in the British legal system that “knowledge of foreign law, even of the law obtaining in some other part of the common law world, is not to be imputed to an English judge.”(North & Fawcett, 1999: 99) Rather, foreign law is a question of fact, and evidence on foreign law may be given by a person who is qualified to do so on account of his knowledge and experience of the foreign law. It is not necessary that the person has acted or is entitled to act as a legal practitioner in the country in question.¹¹⁹ While foreign law in terms of statutory law applied, for example, in Bangladesh and Pakistan is indeed a matter of fact, unfortunately when it comes to questions relating to Muslim laws experts seem to confuse factual codified Muslim family laws with Muslim personal laws, the latter being a conflicting body of hugely varying interpretations of Qur’anic provisions and other sources of jurisprudence which cannot be termed ‘fact’ simply because they are so subject to diverse opinion.

Instead of sticking to the facts involved in case law in Muslim contexts (which can be in itself sufficiently contradictory), the experts have embarked upon an Orientalist-style debate about various obscure aspects of jurisprudence, reinforcing the view of Muslim laws as inherently complicated, 'different' and 'impenetrable' to outsiders. Then supposedly to make all this comprehensible to the British courts, experts have developed entirely new terminology – 'bare *talaq*' and 'full *talaq*' being the most common examples - not used at all in legal systems in Muslim countries! This expert testimony thus clearly goes beyond merely stating the facts of foreign law.

From Qureshi v. Qureshi¹²⁰ through to the last two renowned cases decided before the enactment of the 1986 Family Law Act (Chaudhary v. Chaudhary and the Fatima case¹²¹), the major issue was the precise nature of 'proceedings' in *talaq*: could the actions of the husband divorcing through *talaq* and could the functions of the arbitration council be termed as 'proceedings' to qualify as 'proceedings' under Sec. 2(a) of the Recognition of Divorces and Legal Separations Act 1971 Act? The courts were dependent upon expert witness specialists in Muslim laws and Pakistan law.

Testimony given by expert witnesses affected decisions such as in the Minhas case,¹²² in which David Pearl's affidavit explained the procedure for obtaining *talaq* and how the MFLO operates. The affidavit stated that in "classical Sunni law as understood and applied on the Indian subcontinent [...] the marriage was brought to an end immediately on the pronouncement of *talaq*."¹²³ This error about when a *talaq* becomes effective was pointed out by Lord Fraser in Quazi v. Quazi,¹²⁴ and in the subsequent Fatima case¹²⁵ the court itself noted regarding the Minhas case that "unfortunately, the case proceeded on misunderstanding of the full *talaq* procedure."

But it is not only as expert witnesses that scholars such as David Pearl have helped form the British courts' understanding of Muslim laws. The writings of Pearl and Dr. Werner Menski, as professors of Muslim law at major British universities, carry great weight for academics as well as judges and other adjudicators in these matters. The latest edition of their influential **Muslim Family Law** (Pearl & Menski, 1998: 98), while discussing the issue of *talaq* through proceedings and otherwise, states:

*"One major difficulty in operating this distinction has been that it is based on a certain misunderstanding of what the Pakistani and Bangladesh law on *talaq* divorces actually is, or more correctly, was. It has been overlooked in Britain (but see the warning by Pearl (1987c, p.38) that Pakistan law itself (and also Bangladesh law, unnoticed in Britain so far) has changed quite considerably during the late 80's and early 90's. These changes have not been reflected in the English legislation of 1986, which operates on the basis of certain mental images of Pakistan law and in particular an understanding of Pakistani case law which is now out of date."*

But has the law in Pakistan and Bangladesh actually undergone a ‘considerable’ change as claimed? As far as the statutory provisions are concerned, it has not. The MFLO provisions related to registration of marriage, and procedure for polygamy, *talaq* and dissolution of marriage by means other than *talaq* remain in exactly the same form as enacted in 1961 in both Pakistan and Bangladesh. Although Bangladesh replaced Sec. 5 of the MFLO regarding registration of marriage with the Muslim Marriages and Divorces (Registration) Act, 1974, its provisions were only slightly different and the changes not of relevance to this debate.

Concluding their sub-section on Pakistani Muslim divorce law, Pearl & Menski assert that “Today ...the notice requirements under the MFLO are therefore, in effect, optional and not compulsory.” However, this generalized assertion is based upon a limited reading of relevant case law.

The case law on which they based their arguments came from the mid-1980s when during the ‘Islamization’ wave Sec. 7 of the MFLO (which deals with procedure for *talaq* and its finalization) came under scrutiny from the Federal Shariat Court (FSC)¹²⁶ and the High Courts.¹²⁷ However, in a 1993 landmark case, the Supreme Court noted that the applicability and interpretation of Sec. 7 has to be construed in the light of the facts of each case. The Court itself pointed out that a decision relating to, for example, *mubarat* could not necessarily be extended to apply to *talaq*.¹²⁸ Moreover, case law permitting a relaxation in Sec. 7 notice requirements (upon which Pearl & Menski have based their assertions) arose in the very particular situations where couples faced severe criminal liabilities for alleged extra-marital sex under the Zina (Enforcement of Hudood) Ordinance 1979. There exists equally weighty counter case law evidence, from cases where no such criminal liabilities pertained, which supports the view that Sec. 7 remains in effect.¹²⁹ Although after Pearl & Menski’s book was published a January 2000 judgement of the FSC¹³⁰ struck down Sec. 7 as repugnant to Islam, that judgement remains in appeal in the Supreme Court to this date and therefore the MFLO still stands. Meanwhile, other academics have challenged the accuracy of Pearl’s commentaries.¹³¹

The above discussion raises the question of the role of experts, who remain focused on a notion of ‘classical’ law which no longer exists or selective readings of case law, and who have not considered social developments in their area of expertise. It is questionable whether justice can be administered on the basis of such evidence.

6.5 Are Researchers Asking the Right Questions?

6.5.1 The Absence of Conflicts of Laws Approaches and Political and Rights-based Analysis

Britain’s multiculturalist context and post-modernist thought have had a combined influence on the kinds of research that is commissioned and conducted by contemporary academia in areas related to Muslim marriage and divorce. The focus has overwhelmingly emphasized subjectivity and agency in relation to identity, religion and culture, overlooking the practical realities that people are subject to laws (no matter whether they politically approve of these

laws or not and no matter how successful they are in living beyond their influence). Hence many previous studies have examined Shariah councils and whether or not they 'work' for women and meet a need, etc. While vital information, which both the British state and Muslim communities need to know, this research has not examined the problems women face due to the interaction of British and South Asian law. A conflict of laws approach has been entirely absent from published research. Thus, despite the growing body of research on Muslim marriage and divorce in Britain, questions by lawyers, support agencies and communities themselves about how to validly contract or dissolve a Muslim marriage when the laws of more than one country are involved remain unanswered.

Research by women's groups in other Muslim contexts, such as those linked through Women Living Under Muslim Laws, has demonstrated the highly political nature of women's relationship with law and custom (WLUML, 2003).¹³² Moreover, there are clear political divides between those who publicly demand separate family laws and/or legal structures for Muslims in Britain and those who reject such demands. Yet research into marriage and divorce in the Muslim community in Britain has contained little political analysis and lacked a rights-based perspective on women's relationship with the law. For example, Shah-Kazemi notes that the Shariah council she examined consider the husband's initiation of civil divorce proceedings as "indicating that the husband wants to end the marriage" and his consent to a civil divorce initiated by his (ex)wife "as a significant indicator of his negative attitude towards the marriage" (2001:11). But filing for a civil divorce or agreeing to one is surely much more than an 'indicator', and no research to date has questioned why Shariah councils do not *automatically* issue a certificate that the marriage is also dissolved in the eyes of Muslim laws, and why instead they insist upon lengthy processes of calling husbands to 'give evidence' – which often mean a woman secures her 'Islamic divorce' many months after the civil process is completed. This, despite the possibility of dissolution by the courts in many Middle Eastern laws on the grounds of *dharar* [harm] or *niza'a wa shiqauq* [discord and strife] of which a civil divorce is surely ample evidence. The answer cannot be merely that the Shariah council process provides more appropriate opportunities for reconciliation or greater 'cultural sensitivity' because in a majority of cases the husband simply refuses to attend any such reconciliation meetings; if reconciliation were the issue, the period between the *decree nisi* and *decree absolute* in civil divorce allows for this. A more political reading would argue that by insisting on a separate and complex process rather than appearing to rubber stamp the civil proceedings, the Shariah councils given themselves an opportunity to demonstrate and retain their social and political influence over the community. The net result is a process which although desired by many women is equally a means of violating their right to peace of mind and a fresh start in life.

Political and rights-based analysis is not entirely absent, however. There are some who have pointed out that Muslims cannot simultaneously rely on anti-discrimination law to advance their interests while at the same time argue against gender equality or core values such as freedom of expression (Malik, 2003: 11). They call for broad debate involving the full diversity of Muslims, including women.

6.5.2 The Absence of Comparative Approaches

The political meaning of research to date into women's relationship with Shariah councils and women's experience of Muslim marriage and divorce in Britain is clear from the fact that such studies often end with positive commentary on the utility of the Shariah councils or demands for separate family laws for Muslims. Yet this research is methodologically flawed – and therefore their political conclusions subject to question.

Studies available to date have not counter balanced interviews with women using the Shariah councils with those of women who marry or divorce purely through the British civil system. Are the latter group somehow not regarded as legitimately and sufficiently 'Muslim'? This could easily be the implication behind a comment from one researcher who acknowledges that her sample is limited to "those Muslim women who make their demands from within the framework of the shariah; a priori, the sample cannot include those women who *choose to ignore the precepts of the Shariah* and for whom a civil divorce suffices." (Shah-Kazemi, 2001: 64, emphasis added). It is unclear which 'precepts of Shariah' are being ignored by such women since a British civil divorce is recognized for example by the Pakistan courts.

Studies that only interview women who use the Shariah councils' services (whether in combination with the civil system or outside the civil system altogether) are in effect using a self-selecting group who agree that the councils perform a necessary social function. The result is a partial view of the needs of women in the Muslim community. A far more useful approach would be to compare women's experiences and strategies in civil and religious marriage and in obtaining civil and religious divorce, including all three groups of women in Muslim communities: those who marry and divorce completely outside the civil system, those who marry and divorce exclusively within the civil system, and those who combine the two systems. Equally missing and potentially informative would be a comparative study of Muslim women in Britain with other women in the country or women in the Muslim community in Britain with women in Muslim communities in South Asia.

Some writers (Shah, 2002a) have very sympathetically identified the human problems, particularly the impact upon women and children, caused by the British system's rejection or attempt to control the personal law systems of Muslims in Britain. This has been a balanced by a recognition of people's resourcefulness and agency as well as a clear analysis of the political factors (specifically immigration control and race relations issues) that have informed state policy to date. However, a comparative approach, particularly looking at positions taken by women's movements in South Asia regarding Muslim family laws and customary practices regarding marriage and divorce would strengthen the possibilities of a rights-based and truly gender-sensitive conclusion.

For example, the welcoming of a greater confluence between British and South Asian Muslim family laws regarding recognition of polygamous marriages (Shah, 2002a) must be contextualised with a recognition that since its earliest days, the women's movement in South Asia has sought the strict regulation and ultimate abolition of polygamy, and a recognition of the inequitable gender relations that polygamy perpetuates (WLUML, 2003).

6.5.3 Unravelling Faith, Choice, Identity and Pragmatism

When studies overemphasize religion and culture as determining factors in women's strategies in marriage and divorce, they overlook women's great pragmatism and their ability to successfully negotiate contradictory social pressures and practical realities affecting their lives and the lives of their children.

There appears to be a tension between normative positions and the continuing influence of cultural practices (Samad & Eade, 2002: 68), which is not always taken into account in studies that focus purely on what people say, rather than also looking at what they do. The fact that 55% of women approaching a Shariah council for divorce were doing this *after* obtaining a civil divorce (Shah-Kazemi, 2001: 31) is not only an indicator of their valuing of the Shariah councils but equally an acknowledgement by the majority of the significance of the civil system. Studies have found that, apart from a lack of knowledge of how the law operates, women feel the husband is more likely to listen to the 'Muslim authority' than the 'British authority' (Shah-Kazemi, 2001: 76). But one has to be cautious about the conclusions that can be drawn from such findings. Do they mean that the women give greater value to the 'religious' way of doing things or that they are trying to find the most effective way to get their problems sorted, or a complex combination of these? The answers have serious implications for policy. In one case a woman reported a marked change in her husband's attitude towards her in the civil proceedings after she had obtained a Shariah council certificate. The researcher concluded that her husband would regard the *talaq* divorce as "more definitely binding in terms of ending the marriage" (Shah-Kazemi, 2001: 49). A slightly different interpretation could be that once she had obtained the 'religious divorce' the husband realized he no longer had a social hold over her; this is subtly different from asserting that the husband regarded one or other of the systems as 'more binding'. More balanced conclusions can be drawn regarding men's concern about following religious laws by noting that most men evade at all costs their duty to pay women's rightful *mehr* upon divorce.

Writers have noted that a 1989 survey showed that in case of conflict between Muslim laws and English law, 66% of Muslims would follow the former (Yilmaz, 2001: 297 quoting Hiro, 1991 and Poulter, 1998). Such statements are generalisations that are politicized rather than meaningful to policy because if the survey question was simply "If there is a conflict, would you follow..." it in effect asked people to choose an identity.¹³³ In one area in which there most definitely is a conflict, polygamy, there does not in fact appear to be a groundswell of community opinion in favour of legalising polygamy for the Muslim population. Moreover, when researchers accept statements from the researched such as "It's my religion", they are failing to probe the vast complex of social and economic factors motivating people's choices, and presuming that faith operates in a vacuum. Yet Islam, especially given its focus on community, is certainly not practised in isolation of its general cultural context.

There also needs to be sophisticated analysis of why studies relating to forced marriage have found a distrust of *imams* and community leaders and a lack of confidence in turning to them for help in times of crisis (Samad & Eade, 2002: 95), whereas studies into marriage and divorce generally conclude women find it necessary to involve Shariah councils in resolving their problems.

Our general concern here is that studies to date have been too few and too willing to draw straightforward conclusions in an area that is both highly complex and linked with the most intimate aspects of people's lives. Moreover, existing writings on the topic have been concentrated at the extremes of either lacking in political analysis and a rights-based (or gender) focus, or being motivated designed purely to substantiate a politicized demand for a separate system for Muslims in Britain. Any state policy that is based upon existing research may fall short of meeting the intricate and diverse needs and rights of the Muslim community, and particularly of its women.

Endnotes

- ¹⁰⁸ In 2005 Bano completed her doctorate at the University of Warwick on 'Muslim Family Law and South Asian Muslim Women in Britain', focusing on multiculturalism, identity and gender based upon interviews with Pakistani British Muslim women who accessed various Shariah councils for resolution of family matters.
- ¹⁰⁹ *Bilquis Fatima v. Najm-ul-Ikram Qureshi* PLD 1959 W.P. Lahore 566
- ¹¹⁰ Similar provisions were also recently introduced in Egypt.
- ¹¹¹ *Hilala* requires that before a couple can remarry each other after *talaq* is effective, the wife must undergo an intervening marriage with another man. The practice, which continues in communities which continue to practice instant *talaq*, is a source of extreme anguish and violation of women's bodily rights. However, under the MFLO, *hilala* is only required if a couple divorce each other three times following the complete MFLO procedure. This has in effect abolished the practice.
- ¹¹² *Balqis Fatima v. Najmul Ikram Qureshi* PLD 1959 (Lahore) 566, at p. 584. This case established the law in Pakistan on *khula* which diverged from the standard Hanafi position, hence the reference to 'jurists' in the judgement.
- ¹¹³ *Muhammad Latif v. Hanifan Bibi* 1980 PCrLJ 122, where the husband's argument was that his triple *talaq* had become immediately effective on pronouncement. This argument was rejected and it was held that *talaq* remained ineffective for a period of 90 days after the service of notice to the local council. See also *Ghulam Fatima v. Abdul Qayyum* PLD 1981 SC 460
- ¹¹⁴ *Muhammad Riaz v. Federal Government* PLD 1980 FSC 1. For a detailed discussion, see Hodkinson, 1984: 82-87.
- ¹¹⁵ This interpretation of Muslim laws has also been accepted by courts in India.
- ¹¹⁶ *Quazi v. Quazi* [1979]3 All E.R. 897
- ¹¹⁷ *Khurshid Bibi v. Babu Muhammad Amin* PLD 1967 SC 91
- ¹¹⁸ The terms and conditions of *mubarat* can be settled by the parties themselves without judicial or administrative intervention, either to supervise or certify those terms; the only involvement of any state authority is that, like *talaq*, under Sec. 8 of the MFLO (which requires procedure under Sec. 7) a notice is to be served to the local council for arbitration proceedings. Such a notice is slightly distinguished from *talaq* as *mubarat* notice is to be signed by both spouses who have agreed to dissolve their marriage while *talaq* notice is served by the party exercising it. There is clear case law in Pakistan distinguishing between *khula* and *mubarat*: *Ghulam Sakina v. Umar Bakhsh* PLD 1964 SC 456; *Barkat Jan v. Habib Khan* PLD 1985 SC(AJ&K) 60. For a detailed discussion on the distinction between *khula* and *mubarat*, see Rehman, T., (1997) *Muslim Family Laws Ordinance - Islamic & Social Survey*, Royal Book Company, Karachi, p. 212-213
- ¹¹⁹ Section 4(1) of the Civil Evidence Act 1972
- ¹²⁰ *Qureshi v. Qureshi* [1971]1 All E.R. 325
- ¹²¹ *Chaudary v. Chaudhary* [1984]3 All E.R. 1017 and *R. v. Immigration Appeal Tribunal and Another, ex-parte Secretary of State for Home Department and Other Applicants* [1984]1 All E.R. 488
- ¹²² *R. v. Registrar General, ex p. Minhas* [1977] Q.B. 1

- ¹²³R. v. Registrar General, ex p. Minhas [1977] Q.B. 1 at p. 247
- ¹²⁴Quazi v. Quazi [1979]3 All E.R. 897 at p. 910
- ¹²⁵R. v. Immigration Appeal Tribunal and Another, ex-parte Secretary of State for Home Department and Other Applicants [1984]1 All E.R. 488, at p. 493
- ¹²⁶The FSC was established in 1980, with jurisdiction under Article 203(D) of the Constitution to “examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam.” But the FSC’s jurisdiction did not extend to all laws, and under Article 203(B)(c) the Constitution itself and Muslim personal law was excluded from its jurisdiction.
- ¹²⁷With the incorporation of the preamble of the 1973 Constitution as a substantive Article 2-A in 1985, the High Courts assumed jurisdiction to examine laws vis a vis their repugnancy to Islam.
- ¹²⁸Kaniz Fatima v. Wali Mohammad PLD 1993 SC 901 at p. 915, a case relating to *mubarat*. This case also clearly held that the FSC and Shariat Appellate Bench of the Supreme Court do not have jurisdiction over the MFLO. The claim of the High Courts’ jurisdiction over the MFLO was also settled by the Supreme Court in Hakim Khan v. Government of Pakistan PLD 1992 SC 595.
- ¹²⁹There is a continuous line of case law upholding the provisions of Sec. 7, starting from Syed Ali Nawaz Gardezi v. Col. Muhammad Yusuf PLD 1963 SC 51 up to the present day, including, for example, Mst. Amna Zakariya v. M. Zakariya Khan and Another 1989 SCMR 170; Major Muhammad Hayat Tarrar v. District Collector Gujranwala 1993 CLC 219; Muhammad Siddique v. Mst. Noor Jahan and Another 1994 CLC 1674; Shahid Nadeem v. Mst. Farzana Zaheer and Another 1995 MLD 218 (Lahore).
- ¹³⁰PLD 2000 FSC 1
- ¹³¹Carroll, L., (1989b) “Teaching of Muslim Law in England - A Critique of David Pearl: ‘A Textbook on Muslim Personal Law’ (Second Edition. London, Croom Helm, 1987)”, All Pakistan Legal Decisions, Journal Section, 102-118. It should be noted that the first and second editions of Pearl’s Muslim Family Law were written without Dr. Menski.
- ¹³²WLUML’s Women and Law in the Muslim World Programme was strongly influenced by the University of Oslo’s Institute of Women’s Law which also influenced the Women and Law in Southern Africa (WLSA) programme. See Stewart J.E. with A. Weis-Bentzon, A. Hellum, W. Ncube and T. Agersnap (1998) Pursuing Grounded Theory in Law: South North Experiences in Women’s Law, Tano, Oslo and Mond, Harare.
- ¹³³This approach recalls the 1984 Pakistan referendum by martial law ruler General Ziaul Haq. The structure of the referendum’s three-part question meant that if one acknowledged one’s faith as a Muslim, one automatically agreed to voting for having Gen. Zia as President.

Section 7

Legal Pluralism in Britain

7.1 The Demand for a Separate System for Muslims

Across Muslim countries and communities, the growing emphasis on religious identity has been repeatedly reflected in key areas affecting women: dress codes and family laws. In parts of West Africa, for example, conservative election candidates have used pledges of introducing 'Islamic family law' in an attempt to mobilize support. In Canada (discussed below) a right-wing Muslim group recently unsuccessfully attempted to introduce 'Shariah-based' arbitration in family matters, inspiring a renewed demand in India among some religious parties for separate courts for Muslims. Worldwide, calls for a separate legal system for Muslims have come from the right-wing, not known for its willingness to acknowledge women's rights and human rights. Whereas women's groups in these various contexts have been at the forefront of resisting regressive change to family laws (and indeed have led campaigns for progressive reform in for example Indonesia, Malaysia, Morocco, Pakistan and Turkey), in Britain women's groups within the Muslim community have yet to develop any clear critique or demands regarding family laws.

While Taliban-style interpretations of Muslim laws are coming to Britain via *imams* imported from South Asia preaching in British mosques (Samad & Eade, 2002: 73), the British Muslim Right's demands for separate treatment for Muslims in family laws is a more clearly political strategy (see Section 3.3). Much of the supporting argumentation for this demand is based on misleading commentary regarding other Muslim contexts. While one can understand that under-resourced women's groups in the Muslim community have felt unable to take a clear position regarding family laws because of their relative lack of cohesion and isolation from the vibrant women's movement in other Muslim contexts (especially Bangladesh and Pakistan), one cannot explain away the misreading of developments in Muslim family laws by male-dominated political groups in Britain that have globalized linkages across the Muslim world and the resources to engage in scholarship.

To assert (Yilmaz, 2001: 298) that many areas of Muslim personal law have "traditionally and purposely been left to extra-judicial regulation" (and thus Muslims should be excluded from the purview of British civil law in family matters), is to ignore the century-long struggles by women and liberals in Muslim contexts for codification precisely because these 'traditional and purposeful' methods have led to rights violations and harmed the nation or community's development. If it is indeed the 'traditional Muslim way' to deal with family matters 'outside state interference' (Yilmaz, 2001: 303), then why have most Muslim majority states, including Algeria, Bangladesh, Egypt, Indonesia, Iran, Iraq, Jordan, Malaysia, Mali, Morocco, Pakistan, Senegal, Syria, Sudan, Tunisia, and Yemen legislated family law? Why is there currently a strong movement demanding codification in Bahrain? The condition of being a minority is no excuse because legislation has long been enacted at the behest of the Muslim community in for example the Philippines, Singapore, Sri Lanka, and Tanzania (and part codification in India). This is not to suggest that the content of these laws are always option-giving for women, but to simply note that it is nonsense to legitimize leaving Muslims to resolve family disputes outside the framework of the state by claiming that this is how it has 'always' been done. Indeed, the Ottoman Code dates back to the 16th century. One needs closely to examine parallels between such claims and the now globally rejected notion that domestic violence is a 'private matter'.

No doubt a large section of migrants in Britain come from areas of Bangladesh and Pakistan where communities have long lived beyond the codified laws of their own countries. But rather than asserting that this is a 'Muslim' tradition, it may be more accurate to state that this is Sylheti and Kashmiri practice. At present, the British state has a somewhat different political response to issues that are claimed to be 'Muslim tradition' and for example 'Pakistani Kashmiri culture'.

Some commentary published in Britain which favours formal recognition of a separate system for Muslims misrepresents the views of minority and ultra conservative sources in other Muslim contexts as representative of majority opinion. For example, claims that all Pakistanis reject the state reform of Muslim personal law encapsulated in the MFLO (Yilmaz, 2001: 301) quote Jamaat-i-Islami sources. Although a powerful political voice, the Jamaat has historically never been hugely popular at the ballot box.

In more sophisticated circles, there has been the recent fashion of talking about *fiqh al-aqliyat* [Muslim jurisprudence for minorities] which argues that the specific context of minority Muslim communities in Europe and North America requires a departure from traditional jurisprudence. While superficially appearing to address the particular challenges facing Muslims in such contexts, this discourse in practice diverts attention away from the central matter that has dominated jurisprudence since the earliest periods of Muslim history: whether majority or minority the question is what social vision – patriarchal or egalitarian – is to all be the framework for jurisprudential interpretation of the Qur'an and Sunnah.

It is interesting that right-wing commentary often slips imperceptibly from discussion of Muslim personal law to discussion of family laws. 'Personal law' means all acts governed by religious law and can include economic and criminal matters. It is interesting that those who demand some form of recognition for Muslim family laws have not equally demanded the introduction of *zina* provisions [criminalisation of extra-marital sex] in Britain. While 'Islamic mortgages' and 'Islamic bank accounts' are now available, efforts to popularize them are nowhere near as visible as calls by various Shariah councils for formal state recognition of their role in family matters. Demands regarding family matters would therefore appear to be more a matter of who represents and controls the community than a question of freedom of religion.

There have been efforts to make some of the Shariah councils appear suitably moderate, innovative and critical of the rigid application of 'traditional' interpretations. For example, there are claims that they take an eclectic approach not tied to any school of thought (Yilmaz, 2001: 304). But in their eclecticism, few take into account the progressive laws codified in many Muslim majority countries, and often trumpet as a sign of their modernism approaches which were codified in the sub-continent as long ago as 1939 and which have been far outstripped by for example recent reform of Morocco's family law. Equally absent from right-wing commentary on Muslim laws in Britain has been a discussion of the tussles between the various Shariah councils. Unfortunately research to date has often failed to clarify that there are multiple self-constituted Shariah councils across the country, which are not governed or overseen by any single authority.¹³⁴

7.2 The Male-centred Approach of the Shariah Councils

If one had any doubts about the political leanings of those who demand a separate legal system for Muslims in Britain – as opposed to those who may demand some form of accommodation of Muslims laws within the existing system – the patriarchal approach underpinning Shariah council processes clearly indicates that these demands come from an approach that is not rooted in social equity.

Decisions on family matters by one of the most prominent Shariah councils, the London-based Muslim Law (Shariah) Council (UK), are revealing. At the time of the research chaired by Zaki Badawi, the MLSC generally refused to give a definitive answer as to whether or not a civil divorce - either uncontested after 2 years with consent, or desertion and decree nisi after 2 years, or contested after 5 years – was sufficient ground for the council to pronounce a Muslim marriage dissolved. In one case, the MLSC told a husband who they knew had secured a civil divorce (Shah-Kazemi, 2001: 43) “according to the Shariah you are still married to her” and instead of innovating by applying concepts of *dharar*, or *shiqauq* allowed the matter to drag on with advice to the woman that the matter required greater examination of the evidence and situation, and the endless exchange of pleading letters requesting the husband to come and give ‘evidence.’

In stark contrast to their prevaricating in the above case, when a husband refused to give his wife a religious divorce after the civil divorce and instead retorted to the MLSC that she was an adulterer, the MLSC responded:

“The members of the Shariah Council, after having discussed your wife’s application for an Islamic divorce and after looking into your submission of [dates] have unianimously agreed to inform you that

- 1) *Adultery is one of the most heinous crimes in Islamic law, the punishment for which is death by stoning. But as Britain is not a Muslim state such a punishment may not be carried out here. This punishment can only be administered in a Muslim state after due process.*
- 2) *The laws of marriage and divorce for their application do not need the authority of a Muslim state and hence a Muslim can marry and divorce in Britain according to Islamic law.*
- 3) *On the basis of your letters which allege adultery against your wife we can assure you that she will be punished by Allah for her immorality but we regret that you are not entitled to withhold divorce from her as a measure of punishment in this respect.”*

(Shah-Kazemi, 2001: 44)

This extraordinary response not only takes an ultra conservative position on adultery that is not law in most Muslim countries (indeed stoning is not the punishment mandated by the Qur'an for adultery¹³⁵) and fails to warn the husband of the strict Qur'anic punishment for false allegations against chaste women. It also immediately presumes – without any lengthy evidence required - the allegations to be correct, assures the husband that she will be punished by Allah, and only 'regretfully' informs him that he cannot withhold the divorce.

Even though Muslim jurisprudence has clear provisions regarding property settlements upon divorce and child custody, the MLSC, like many other Shariah councils, is reluctant to call for the application of religious laws or accept any role in resolving property or other financial matters (Shah-Kazemi, 2001: 43), while child "custody is beyond our jurisdiction, and a decision by a [UK civil] court has to be respected by all the parties" (Shah-Kazemi, 2001: 58). This contrasts with the willingness to intervene in cases where women's marital status is affected.

Procedure in some Shariah councils requires applicants to sign an agreement that they will abide by the Shariah council's decision. While this is certainly not binding in law, one can well expect men to use any conflict with English law as a means of avoiding application of the Shariah council decision. On the other hand, women's greater vulnerability to social pressures means they are more likely to feel they then face an intolerable situation of having to choose between the law and their identity.

The social and emotional value of the Shariah councils' intervention in marital disputes should not be under-estimated. But given the above biases in their approach it is perhaps over-optimistic to assume that they can somehow "serve to empower those Muslim women who make their demands from within the framework of the Shariah." (Shah-Kazemi, 2001: 64).

7.3 Legal Pluralism and the Muslim Community in Britain

Laws are not just institutionalized forms of social control, but are also closely related to identity and give meaning to the social group. It is well established in the field of legal studies that the prescriptive assumption that there can be one nation/one state and one legal system is far from the legal reality found in most societies, which is instead an unsystematic collage of inconsistent and overlapping parts (Guevara-Gil & Thome, 1992: 77, quoting Griffiths, 1986: 4). In other words, legal pluralism is to be found everywhere.

In some contexts this is manifested in parallel legal systems, where for example different religious laws are all formally recognized by the state, but in all contexts there is at least pluralism in that people's lives are governed not only by state law but also customary practices. In a context where there is 'strong' legal pluralism, when a society exhibits different and competing sources of legality, people's behaviour unfolds in accordance with more than one legal order, and that triggers an enormously complex process of interaction, negotiation and competition between the different 'laws' within any society and the development of

'common sensical' strategies and tactics to manoeuvre through this 'interlegality' (Guevara-Gil & Thome, 1992: 87-88). Women in Britain's Muslim community who go to an *imam* to dissolve their forced marriage even when they strongly suspect such a divorce is not valid and only subsequently approach the Forced Marriages Unit for support regarding clarifying their status are examples of this complex process.

Debates around legal pluralism have existed in Britain since the early days of post-war migration from former colonies and have strengthened in the wake of the global phenomenon of assertions of religious identity. Without knowing it, the women and families involved in the case studies presented in Section 2 are contributing to this debate in their own fashion.

Theories of legal pluralism have noted the asymmetrical power relations between multiple legal orders. Certainly British civil law and the Shariah councils are not equal in terms of power. But proponents of formal recognition of legal pluralism frequently fail to take into account gender dimensions. Research has found that in contexts where religious identity has become politicized, parallel legal systems in family laws generally do not work to women's advantage and where options exist, women are invariably in practice governed by the less equitable provisions (WLUMML, 2003; WLUMML, forthcoming 2006, regarding Muslim family law in South Asia). This is not necessarily to argue for a uniform civil code in all contexts but to emphasize the need first to take into account the gender impact of whatever family laws are applied, and second to ensure the rights-based content of whatever and however many systems operate in any given state.

Although there has been a 20-year history of the demand for formal recognition of Muslim family law in Britain, supported by various Shariah councils and politico-religious organizations, in recent years it has been stated that "attention should be turned away from grandiose schemes to more mundane local initiatives with greater potential for achieving practical results" (Yilmaz, 2001: 302). However, the precise content of that demand is unclear.

Various reasons may explain this imprecision. Most importantly, the Muslim community in Britain, given its cultural, sectoral and political diversity, would be unlikely to be able to agree on the content of a specific demand regarding Muslim family law in Britain, and that would embarrassingly explode the myth that there has always been a monolithic way of 'being Muslim'. Additionally, politicized elements in the community are well aware that the state's commitment to multiculturalism is equally balanced by assimilationist and ultimately racist perceptions about the (overwhelmingly migrant) Muslim community that would mean the state would never in practice countenance formal recognition of separate laws. Finally, given the above two factors, it is far more powerful to continue to make vague demands for recognition as this prevents open public debate both within the community and beyond on specificities while also giving those who make such demands the possibility of claiming for themselves the right to represent the community and its needs vis a vis British civil law. Indeed, it is in the best interests of the Shariah councils, for example, that Muslim family laws in Britain remain unregulated and uncodified because this then requires constant reference to the Shariah councils for interpretation.

The latest approach appears to be a demand for the legitimisation by the British state not of the rules of Muslim jurisprudence but of institutions such as the Shariah councils. Academics such as Menski have effectively espoused this cause by recommending that in Muslim matrimonial cases the English courts should seek *fatwas* from Shariah councils (Pearl & Menski, 1998: 175). Yet formalising a role for Shariah councils in the name of diversity runs the risk of homogenising interpretations of Muslim family laws that could reduce options for women.

Meanwhile, Shah-Kazemi recommends 'Muslim mediators' in civil disputes involving Muslims and equates this with the role of priests in the Hispanic community in America (2001:75). While the merits of such a role, and specifically the extent of the sensitivity towards women's needs is a separate debate, it is important to be clear that if introduced Britain would be creating a role for *imams* that does not necessarily exist elsewhere in the Muslim world and is not necessarily reflective of 'Muslim tradition'. Also, research for example in Malaysia has revealed problems with Religious Department counselling and mediation in Muslim family matters (Mohamad, 2000). Equally, to talk of a Shariah council as acting "as a Qadi in resolving disputes" (Shah-Kazemi 2001: 9) somehow equates and validates its role with that of family courts in Muslim countries. Yet there are major differences; for example in Pakistan a woman can be a judge and she is required to have knowledge of the statutory law, not be a scholar of theology.

Meanwhile, another related legal pluralist approach has been to call for recognition of social and customary practices of South Asian Muslims in the legal domain (Pearl & Menski, 1998; Menski, 2000; Pearl, 1995). Apart from being vague, as discussed in Section 6.2 above this call is based on jurisprudential provisions that have been supplanted by specific legislation on Muslim family law in South Asia and which are generally more option-giving for women.

Ultimately, whether uniform or plural all systems must be measured on the touchstone of what rights are actually accessible to women and the marginalized and how far they enable families to function as safe, happy and stable environments for all concerned.

7.4 The Failings of the Current British System

No matter how strong our critique of demands for separate Muslim family laws, the problems facing women in Muslim marriage and divorce in Britain as discussed in Section 1, 2 and 4 demonstrate real discrimination and rights violations that necessitate action both from the state and the community (see Section 8: Recommendations). The lack of space in the English system for appropriate solutions to dilemmas facing people such as those involved in the case histories in Section 2 (which generally result from non-recognition of the status which they claim) is precisely one of the major factors behind the emergence of non-statutory bodies such as the Shariah councils.

Yet some experts continue to assert that these conflicts and problems do not arise from any failing or defect in the laws of England (Carroll, 1985: 227) and that “English law appeared reasonably clear and settled” (Carroll, 1989a: 154). However, even the courts (in a 1995 case relating to Jewish marriage) have however noted that the law regarding recognition of overseas divorce may be ambiguous and that Parliament was the proper forum to debate whether or not in an increasingly multi-racial and multi-ethnic society the refusal to recognize transnational divorce can or should continue.¹³⁶ In other words, perhaps fresh legislation may be needed. Carroll also claims regarding divorce that there is a similarity of provisions under the English and Pakistan legal systems without substantiating this with reference to any case law (Carroll, 1985; Carroll, 1997; and Carroll, 1998).

Similarly vague assertions that “English law can be extremely accommodating of Sharia law rights” (Khan, 2003) overlook the fact that unlike Muslim laws, English law does not see marriage as a contract; reduces contractual stipulations to the status of pre-nuptial agreements which are at the court’s discretion to recognize; does not understand the meaning and nature of *mehr*; provides for far lengthier and more expensive divorce processes than for example *talaq-e-tafweez* under the Muslim Family Laws Ordinance; does not recognize a couple’s right to mutually negotiate a rapid and painless divorce that is to be simply processed by a legal authority; and does not have a concept parallel to *mata’a* [a compensatory one-off gift upon divorce by the husband separate from any post-divorce maintenance provisions]. This is not to argue that all these provisions are better or worse than English law but simply to point out that sweeping statements about the relationship between Muslim laws, statutory laws of Muslim countries and English law are unhelpful, and it is time that specifics were discussed so that people’s real-life problems can have some hope of redress.

Even obvious calls for judges and magistrates to be trained to deal with Muslim litigants and their disputes in a sensitive manner (Yilmaz, 2001: 304, citing Poulter, 1998) need to clarify the content of that ‘sensitivity’. Does this mean accepting Shariah council decisions as the legitimate representation of what is best practice in Muslim family law, or educating legal professionals on the most gender-sensitive provisions available in diverse statutory laws in Muslim countries, or familiarising them about customary practices among South Asian Muslims in Britain?

Finally, there are analysts who speak of “Asian traditions and English law” (Poulter, 1990)., While custom is undoubtedly an important factor, British nationals who are also Bangladesh and Pakistan nationals¹³⁷ must also follow the **laws** of these countries. Any approach which sees South Asians as concerned purely with preserving their “cultural heritage” and then asserts that “To a large degree Asian traditions (in all their rich diversity) and English law are perfectly compatible with one another” but there is the occasional “clash of cultures” which is to be resolved by English law (Poulter 1990:1) runs the risk of implying that people in such countries live outside the formal law or that there is no codified law. Were this the case, many of the problems thrown up by inter-country cases in Muslim marriage and divorce would simply not arise.

7.5 Conclusion

The previous two Sections have highlighted various factors that have contributed to the current situation where women in the Muslim community, particularly those who are dual nationals with Bangladesh and Pakistan, face the uncertainties and distress of 'limping marriages' and the apparent impossibility of accessing justice and peace of mind when they find themselves in marriages and divorces that are not recognized as valid. These factors include:

- The British state's failure to understand the operation of Muslim laws in countries such as Bangladesh, India and Pakistan;
- The British state's failure to legislate effectively to address uncertainties regarding the status of Muslim marriages and divorces;
- The lack of a policy research focus on family laws in minority and ethnic communities;¹³⁸
- The tendency of experts to homogenize Muslim laws and emphasize jurisprudence that has in fact been supplanted by codified statutory laws in Muslim contexts;
- The insistence by other experts that problems in Muslim marriage and divorce in Britain can be resolved within the current system, overlooking real conflicts of law;
- The overall lack of knowledge among British academics and researchers regarding the diverse legislated provisions of Muslim family laws and their application in Muslim contexts;
- The absence of gender analysis, a rights-based approach and comparative approaches in relevant research;
- The politicisation of debates regarding family laws within the Muslim community and the focus on legitimization of institutions and religious organizations, with solutions to people's problems as a by-product rather than the main aim;
- The continuing general lack of a gender-sensitive approach within community institutions dealing with marriage and divorce, apart from under-resourced and embattled women's support groups; and
- The absence of a proper public debate within the Muslim community over how best to address the relationship between Muslim family laws, customary practices and English law.

None would disagree that the official law has an ostrich-like head in the sand attitude (Yilmaz, 2001: 305). Indeed, with the important exception of the current campaign to develop a model British Muslim marriage contract and encourage greater levels of registration of mosques (thereby ensuring Muslim marriages are recognized by law¹³⁹), community leaders could be accused of the same. The question is what is the solution.

What is needed in order to move towards a solution is a rights-based approach which critiques both the current alienation of Muslims in family law matters by the civil system as well as the rights abuses perpetrated in the name of 'religious' systems, and which examines the content and practical outcomes of all proposed changes to law, policy and practice.

Calls for “explicit recognition of the presence of other normative orders” and efforts to find solutions that harmonise Shariah and English law (Yilmaz, 2001, 304) might be what is needed. But the precise content of and meanings behind terms such as ‘other normative orders’ have yet to be openly debated within the community and negotiated between the community and British law. Should these normative orders be, in the case of the Muslim community, an emphasis on Islam as a religion of social justice which explicitly recognizes the equality of men and women before Allah; or should they mean the British state should tolerate lesser rights for Muslim women because certain community leaders claim this is the only appropriate normative order for Muslims? What should be the extent of multiculturalism’s accommodation of diversity vis a vis the Muslim community and should this ‘elasticity and innovation’ not be extended to matters *within* the Muslim community?

Finally, the current situation presents an untenable contradiction. On the one hand, British law and policy, perhaps informed by immigration control assimilationist perspectives, continue to take a restrictive and somewhat disdainful attitude towards foreign legal systems and the acts of those governed by those legal systems. On the other hand, under the banner of multiculturalism and cultural accommodation, the state is creating more and more space for ‘religious and cultural considerations’ (strictly as defined by conservative forces within religiously-defined communities rather than progressive or secular forces within them) to be taken into account.¹⁴⁰ In the current global political context, it is not surprising that this is particularly visible vis a vis the Muslim community. In this entire process, people’s human rights and the impact all this politicking has on their family matters is overlooked.

Endnotes

¹³⁴ This has worked extremely well for women’s support groups who have been able to develop positive relationships with more gender-sensitive councils and send their clients to such councils for support in their ‘Islamic divorce’.

¹³⁵ See Surah Al-Nisa (4): verse 15; Surah Bani Isra’il (17): verse 32; Surah Al-Nur (24): verses 2-4

¹³⁶ Berkovits v. Grinberg and Another [1995]2 All E.R. 681 at 696j

¹³⁷ The vast majority of British citizens of Pakistani and Bangladeshi origin are dual nationals given the British state’s construction of dual nationality, which is “by birth, by descent through either parent, by marriage or by residence.” Foreign & Commonwealth Office, Consular Services Dual Nationality, 1997.

¹³⁸ The 2005 nationwide consultation on proposed legislation on forced marriages has a criminal law rather than family law focus.

¹³⁹ See <http://www.muslimparliament.org.uk/registration.htm>

¹⁴⁰ A fascinating discussion of the creation of such spaces in connection with a case involving the dispute between a Bangladeshi-origin Muslim woman and her estranged Sikh husband over their child: Re S (change of names: cultural factors) 15 May 2001, [2001] 2 FLR 1005, cited in Shah, 2002b.

Section 8

Solutions for Other Communities and Elsewhere

For reasons of space, this report cannot examine the full scope of how personal laws of other religious communities have been treated in Britain, nor can it examine all the variety of arrangements for Muslim minority communities in other countries. This section is merely to note that the dialogue in Britain needs to be aware of a wider range of debates.

Those who argue for a separate system for Muslim family laws in Britain frequently point to the British state's allowance of separate provisions for groups such as Jews and Sikhs, often termed 'favourable treatment' (Yilmaz, 2001: 298). While it is certainly inappropriate in a multicultural state bound by the terms of the Human Rights Act, 1998 that religious groups should be treated differently by the state, this in itself does not justify the conservatives' demand. It leaves unanalysed the question of whether such separate provisions actually guarantee the rights of all within that community, specifically its women. Experience from other contexts indicates that separate treatment may indeed work to the disadvantage of those who are marginalized or less powerful within their own community.

In September 2005, after a two year battle, women in the Canadian province of Ontario won a major victory when the Ontario Premier announced that family law matters would be resolved exclusively through the courts and the option of using the 1991 Arbitration Act for 'religious arbitration' would no longer be a possibility. In 2004, women's groups including the Canadian Council of Muslim Women, had been shocked when a government report had in effect endorsed use of the Arbitration Act to enable self-styled 'Shariah courts' to hear family law disputes among Muslims. The 1991 Act was already being used to enable certain Christian and Jewish sects to use religious rules in resolving family law matters - and women from these communities had raised experience-based concerns regarding the impact on women and formally shared these concerns with the report's author. Nearly 100 women's groups, labour organizations, faith groups and community organizations came together under the banner of the No Religious Arbitration Coalition and maintained that the issue at stake was not Islam, or Muslims, but religious arbitration in all family matters.¹⁴¹ Opponents of the provisions argued that justice was being 'privatized'. The Canadian Council for Muslim Women was strongly supported in its campaign by the Muslim Canadian Congress, a mainstream organization. The Canadian example is an important one for Britain, especially because Canadian policy has a similar commitment to multiculturalism, freedom from racial discrimination, and gender equality.

Meanwhile, South Africa has also seen a long and lively debate involving the courts, Parliament, religious organizations, community groups, women's rights groups and policy institutions over the recognition of Muslim family laws. A Muslim Personal Law Bill has been drafted and re-drafted but has yet to be finally debated in Parliament and there are major questions as to the relationship between gender equality provisions and the recognition of religious freedoms in the South African Bill of Rights. Some of the country's most taxing constitutional law cases have revolved around the recognition of Muslim marriages contracted beyond the civil law system¹⁴² and over the years *nikah* marriages have been given increasing recognition in practice in terms of for example taxation and life insurance provisions.

More than 20 years before the British system finally settled the question of the recognition of foreign marriages under systems permitting polygamy (see Section 4.1.4) the 1971 Law Commission Report No. 42 noted how New Zealand and Australia had simplified the approach to foreign Muslim marriages. In brief, New Zealand and Australia only recognized the rights of the first wife in a polygamous marriage (even if she died or was divorced).

Meanwhile, policy makers and the Muslim community in Britain may recoil at the bluntness of Norway's position regarding all matters of inter-country cases, although it has the undeniable advantage of simplicity. According to the Norwegian Directorate of Immigration website (www.udi.no): "Norwegian law applies to everyone resident in Norway. If there are conflicts between Norwegian laws and religious laws, it is always the Norwegian laws that apply."

In the seven years since 1998 when the European Union Member States signed the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters (known as the 'Brussels II Convention'), the EU has moved towards standardizing the rules of Private International Law relating to which country's court should have jurisdiction in matrimonial (and parental responsibility) cases involving people moving between or living in more than one Member State. The current provision, which came into force in March 2005, is Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility. The approach behind the EU Regulation is quite in contrast with the British system's current approach in its relationship with the legal systems of countries from where the majority of Britain's ethnic minority migrants originate. These clear and uniform provisions, which do not lead to the domination of any one country's legal system, could serve as a useful model for addressing issues of conflicts of laws regarding matrimonial affairs between the British system and legal systems beyond the EU.

Endnotes

¹⁴¹ www.ccmw.com/MuslimFamilyLaw/Coalition%20Premier%20thank%20you%20letter%20Sept%2012%2005.doc

¹⁴² Daniels v. Campbell and Others, Case CCT 40/03, decided in 2004

Section 9

Recommendations

To date, solutions for the problems facing women regarding the validity of Muslim marriages and divorces in Britain have been dichotomized.

On the one hand, academics such as Lucy Carroll insist there is essentially no conflict between Muslim laws and British law (perhaps broadly correct as far as general spirit is concerned but as our study shows, woefully optimistic); such positions therefore suggest no change in English law regarding recognition of Muslim marriage and divorce. On the other hand, academics such as Werner Menski and David Pearl have argued for a privileging of 'Shariah' which the British courts should apply in hearing matters relating to South Asian Muslims – irrespective of the fact that they are nevertheless subject to certain concrete statutory provisions which do not necessarily match Pearl & Menski's largely conservative understandings of 'Shariah'. Taking courage from this perspective, there have been calls for the creation of a parallel legal system, applicable to all British Muslims (see Sections 3.3 and 7.1-7.3), or more vague support for the work of the various 'Shariah councils' across the country (Shah-Kazemi, 2001).¹⁴³

Instead of these dichotomized approaches, we have sought to look at what measures would move in practical terms towards guaranteeing the human rights of those affected, especially women and migrant Muslim communities from Bangladesh and Pakistan who by compulsion of 'nationality' are still governed by or permitted to interact with the law of their 'country of origin'.

This can be achieved within the limits and patterns of existing British law, without the creation of any parallel legal system, within a framework of respect for values and practices in the Muslim community, and without compromising the basic rights of women. If implemented, these measures will not lead to a flood of entrants to the UK but may, on the contrary, ensure far greater justice and an end to suffering for those currently affected.

Although our recommendations relate to the more limited area of our study – the recognition of Muslim marriages and divorces in the context of inter-country cases involving British and South Asian nationals, they have a wider relevance to family laws in the Muslim community in general in Britain as well as to inter-country cases involving nationals of other Muslim majority or minority countries.

We recognize that developing a blueprint that will address all matters involved to the satisfaction of all is complex, not the least in the current political context where the closely related issue of immigration and relations between the state and the Muslim community are the subject of public debate. Perhaps Samad & Eade's comments regarding policy measures and advocacy to tackle forced marriages (2002: 6) could be applied to the wider questions of the recognition of Muslim marriages and divorces: "there are concerns that racial stereotypes are shaping public debate about forced marriages and the policy initiatives that may emerge. It is only through an approach which problematizes ethnicity and culture as contested terrains that these concerns can be dealt with. Recognition of the internal diversity of communities provides the basis for a more refined and nuanced understanding

of the complex social space occupied by community.” The question for the state as well as for the Muslim community in Britain is how to ensure the group as a whole is protected from racism and discrimination and enabled to access its rights as any other group, and at the very same time ensure that individuals within that group do not suffer oppression at the hands of group members.

When formulating recommendations, one has to be mindful of the media minefield that is both family law and Muslims in general and Muslim family laws in particular. Much can be misrepresented, misunderstood and at times deliberately distorted in order to tarnish. But the problem is there and both state and community need to act in order to address the current injustices.

As our focus was on policy, our recommendations necessarily focus on official administrative and procedural aspects. Recommendations relating to community advocacy would necessarily need further discussion and development in collaboration with community groups, especially women’s rights groups. The current laws result in lifelong consequences for South Asian Muslims that may be without remedy, and which are experienced in the most personal area of their lives. This raises the need for a process of reform through a larger consultative process involving those whose lives are to be regulated by these laws.

A. Increased Information, Knowledge, and Training

- Reader-friendly information regarding the basic relevant provisions of law – and the consequences of ignoring these must be developed in collaboration with and shared widely with Muslim communities in Britain, especially women, as well as women visiting relevant consular offices abroad;
- Women’s groups in the Muslim community and working with Muslim communities in Britain must strengthen their linkages both with each other and with women’s groups in other Muslim contexts in order to access women-friendly analysis of Muslim family laws, global developments in the sphere of Muslim family laws and statutory departures from the orthodox application and interpretation of ‘Shariah’, and strategies for strengthening their efforts to protect and promote their rights within frameworks of national constitutions and rights instruments (including those ratified by Muslim majority states);
- All bodies providing advice in matrimonial matters, especially institutions such as ‘Shariah Councils’, must familiarize themselves with the provisions of law in other Muslim countries in order to ensure they do not inadvertently create or complicate a situation of conflict of laws;
- Case officers and legal professionals working in women’s rights and support groups, shelters, immigration support groups and especially such groups offering legal services, must be offered training in the conflicts of laws and issues of recognition of Muslim marriages and divorces in Britain;

- Law colleges in Britain and relevant countries abroad need to collaborate on strengthening professional training on conflicts of law and issues of the recognition of Muslim marriages and divorces that responds to the practical issues facing family law practitioners;
- Entry Clearance Officers and relevant consular staff at British High Commissions in relevant countries as well as local staff must routinely receive training in issues concerning the recognition of Muslim marriages and divorces and conflicts of law;
- Succinct information materials must be developed to support the related work of both government and non-government practitioners and supplement training received.

B. Debate and Changes to Provisions of Law and its Implementation

- British law should recognize the struggles of women in other Muslim majority and minority contexts for regulation of family affairs, and should continue not to recognize *nikahs*, polygamous marriages and *talaqs* or other dissolutions of Muslim marriages that take place beyond state regulation;
- The judicial interpretation of 'other proceedings' needs to move towards a more judicious application of the text, taking into account people's actual steps, and evidence of their intentions as well as greater understanding of the operation of laws in foreign jurisdictions;
- The validity of marriages and divorces which have remain unchallenged by any party in the jurisdiction in which they occurred for a substantial period of time (eg, over 7 years) should not subsequently be available for challenge by British authorities;
- The validity of an earlier marriage or divorce between two people, who had no connection with Britain in terms of domicile, habitual residence or nationality, should not be subsequently called into question in the British courts or by British authorities if it was recognized as valid in the country in which it was contracted or obtained;
- The Family Law Act 1986 provisions regarding the recognition of non-EU overseas divorce should be amended along the pattern of the amendments to the Act made to give effect to the European Union's Council Regulation (EC) No 2201/2003 of 27 November 2003 (which came into force in March 2005). This Regulation clarified jurisdiction and the recognition and enforcement of judgements in matrimonial matters in order to avoid conflicting judgements in two different EU jurisdictions;
- The recommendations of Law Commissions regarding the recognition of Muslim and foreign marriage and divorce should be re-examined and given effect after appropriate debate;
- Given the lifelong consequences for South Asian Muslims of the application of law in Britain in the most personal area of their lives any process of reform requires a larger consultative process involving those whose lives are to be regulated by these laws;
- Resulting legislation should fully take into account statutes and their implementation in foreign jurisdictions, as well as ensuring that the initiation and completion of a divorce should be within a single jurisdiction;

- While dower is a requisite of Muslim marriage and not a pre-nuptial agreement, the generally positive trend of acknowledging Muslim marriage contracts as pre-nuptial agreements should take into account patterns and conditions of Muslim marriage contracts, eg, dower and other conditions permissible under Muslim laws.

C. Policy and Procedures

- While sham and forced marriages must not be allowed to be used for immigration purposes, validation of an individual's status must be de-linked from immigration concerns;
- The Marriage Act 1949 must be amended to facilitate the registration of more premises including mosques as places for civil ceremony, or legislation must move away from its focus on the place of ceremony to the celebrants and registration of the marriage itself;
- Either through expansion of the General Register Office (Southport), which has an Overseas Section, or through the creation of a new service, a body must be clearly designated by government to coordinate all matters relating to the validation not only of marriages and divorces (for all communities) conducted in England and Wales (with similar provisions recommended in Scotland and Northern Ireland), but also overseas marriages and divorces. This body should be responsible for developing the relevant expertise and training required to ensure a coherent application of the law regarding recognition of marriages and divorces;
- There must be a stop to the practice of Registry Offices issuing a 'Usual Warning' (that the remarriage may not be valid) when it certifies a previous divorce thereby allowing a remarriage to take place. Once recognized, and a permission certificate is issued, any remarriage under the Marriage Act 1949 should be beyond challenge by the British authorities seeking to apply law relating to pension, insurance, taxation, etc. and laws relating to the consequences of marriage (eg, succession). Challenge should be permitted when the earlier divorce has been challenged in the jurisdiction in which it was conducted, or in Britain, by the parties to the marriage or a third party affected by that marriage and been held to be of no legal effect;
- Where there are doubts about the status of a couple seeking to marry in Britain under the Marriage Act 1949, especially where this relates to a divorce obtained in another jurisdiction through extra-judicial means, the couple is to either obtain a decree of recognition in a British court or have any documents relating to the divorce verified and attested by the relevant embassy/High Commission.

D. Action by Communities

- The Muslim community must strengthen its efforts to ensure as many places, including mosques, as possible are registered under the Marriage Act 1949, and couples encouraged to conduct their marriages at such mosques;
- The Muslim community must strengthen its efforts to promote written, rights-protecting Muslim marriage contracts which can be enforceable as a contract in Britain and overseas;

- All Shariah Councils which provide support to couples regarding any marital issue in the case of a *nikah* not under civil law must clarify to the couple their status under British law;
- In the event that a couple is in a marriage recognized as valid under British law, following the practice of some Shariah Councils, in relation to questions of marriage and divorce all Councils must as a matter of policy require the couple to first initiate proceedings under English civil law;
- Shariah Councils must recognize other forms of Muslim divorce beyond *talaq* and *khula* – as recognized in statutory laws and implemented in other Muslim contexts;
- Any unregistered mosque or place of marriage where a *nikah* is solemnized or persons who solemnize a *nikah* must inform the couple in writing that their marriage has no recognition in British law and keep a written record of having informed the couple.

E. Action by Foreign Governments

- The Bangladesh and Pakistan governments should enact statutory provisions on the recognition of foreign marriages and divorces.
- The Indian governments should enact statutory provisions on the recognition of foreign divorces.

Endnotes

¹⁴³ The Muslim Right was irked to discover that Shah-Kazemi's study (while from a women's rights perspective hardly critical of the Shariah council it studied) did not conclusively recommend the formalisation of Shariah councils. See, for example, the review of her study by M A Sherif <http://www.salaam.co.uk/bookshelf/review.php?option=5>

Annexe 1

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Annexe 2

Key-Informants

Some key-informants chose to remain anonymous and we have only mentioned, as agreed, their institutions.

Justice Jill Black

David Pearl, President, *Care Standards Tribunal*

Justice Peter Singer, *High Court of Justice, Family Division*

Ms. Balakrishnan, *Imran Khan Law Associates*

Anne-Marie Hutchinson, *Dawson Cornwell/Chair, Reunite - International Child Abduction Centre UK*

Poonam Joshi, *formerly Winstanley-Burgess*

Sonali Naik, *Barrister, Garden Court Chambers*

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Amir Sultan, *solicitor, Birmingham*

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Lorraine Fussey, *UK Visas Policy*

Heather Harvey, *Forced Marriage Unit (Home Office-Foreign & Commonwealth Office)*

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Elina Khan, *Advocate, Bangladesh Supreme Court/Executive Director Bangladesh Society for the Enforcement of Human Rights*

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Dr. Shahdeen Malik, *Advocate Supreme Court/Dean, School of Law, BRAC University*

Dr. Faustina Pereira, *Advocate, Supreme Court of Bangladesh/Director, Advocacy, Ain-o-Salish Kendra, Dhaka*

Kaveri Sharma, *Legal Officer, Newham Asiam Women's Project*

Nadia Siddiqui, *South Manchester Law Centre*

Dr. Ghayasuddin Siddiqui, *leader of the Muslim Parliament*

Shuile Syeda, *Toynbee Hall, Tower Hamlets*

Shahien Taj, *All Wales Saheli Association, Cardiff*

Fariha Thomas, *Amina Muslim Women's Resource Centre, Glasgow*

Section 5 Registration of Marriages:

- (1) Every marriage solemnized under Muslim law shall be registered in accordance with the provisions of this Ordinance.
- (2) For the purpose of registration of marriages under this Ordinance the Union Council shall grant licences to one or more persons to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.
- (3) Every marriage not solemnized by the Nikah Registrar shall for the purpose of registration under this Ordinance, be reported to him by the person who has solemnized such marriage.
- (4) Whoever contravenes the provision of sub-section (3) shall be punishable with simple imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees, or with both.
- (5) The form of nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of nikahnama shall be supplied to the parties and the fees to be charged thereof, shall be such as may be prescribed.
- (6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under sub-section (5), or obtain a copy of any entry therein.

Section 6 Polygamy:

- (1) No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the arbitration council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.
- (2) An application for permission under Sub-Section (1) shall be submitted to the Chairman in the prescribed manner together with the prescribed fee, and shall state reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.
- (3) On receipt of the application under Sub-Section (2), Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the arbitration council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such condition if any, as may be deemed fit, the permission applied for.
- (4) In deciding the application the arbitration council shall record its reasons for the decisions and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, in the case of West Pakistan to the Collector, and, in the case of East Pakistan, to the Sub-Divisional Officer concerned and his decision shall be final and shall not be called into question in any Court.

- (5) Any man who contracts another marriage without the permission of the arbitration council shall,
- (a) pay immediately the entire amount of the dower whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and
 - (b) on conviction upon complaint be punishable with simple imprisonment, which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

Section 7 Talaq:

- (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.
- (2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees, or with both.
- (3) Save as provided in sub-section (5), a talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.
- (4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.
- (5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in sub-section (3), or the pregnancy, whichever be later, ends.
- (6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from re-marrying the same husband, without an intervening marriage to a third person, unless such termination is for the third time so effective.

Section 8 Dissolution of marriage otherwise than by talaq:

Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by talaq, the provisions of Section 7 shall, mutatis mutandis and so far as applicable, apply.

The Law Commission No.42 Family Law, Report on Polygamous Marriages

The Law Commission No.103 Family Law, The Consequences of Divorce: The Basic Policy A Discussion Paper

The Law Commission No.117 Family Law, Financial Relief After Foreign Divorce

The Law Commission No. 137 Private International Law, Recognition of Foreign Nullity Decrees and Related Matters

The Law Commission No.146 (and Scottish LC No. 96) Private International Law, Polygamous Marriages: Capacity to Contract a Polygamous Marriage and Related Issues

The Law Commission No.168 (and Scottish Law Commission No. 107) Private International Law, The Law of Domicile

The Law Commission No.175 Family Law, Matrimonial Property

The Law Commission No.217 Family Law, The Effect of Divorce on Wills

The Law Commission (1982) Working Paper No. 83 (Scottish Law Commission Consultative Memorandum No.56) Polygamous Marriages: Capacity to contract a polygamous marriage and the concept of a potentially polygamous marriage

Marriage Act 1949

Immigration Act 1971

Recognition of Divorces and Legal Separations Act 1971

Matrimonial Proceedings (Polygamous Marriages) Act 1972

Matrimonial Causes Act 1973

Domicile and Matrimonial Proceedings Act 1973

Matrimonial and Family Proceedings Act 1984

Family Law Act 1986

1986 No. 1444– statutory instruments: Marriage The Marriage (Authorised Persons) Amendment Regulations 1986

Immigration Act 1988

Marriage Act 1994

1995 No. 510 – statutory instruments: Registration of Births, Deaths, Marriages, etc. England & Wales, The Marriages (Approved Premises) Regulations 1995

Private International Law (Miscellaneous Provisions) Act 1995

Human Rights Act 1998

Immigration and Asylum Act, 1999, Explanatory Notes

Immigration and Asylum Act, 1999, Marriage Act, 1949

Nationality, Immigration and Asylum Act, 2002

1970, The International Convention on the Recognition of Divorces and Legal Separations, The Hague

“ Many thousands in the Muslim community in Britain as well as non-British spouses of British Muslims may be in marriages or undergo divorces whose legal validity is doubtful in the eyes of the English courts and authorities such as immigration and pensions.

This leaves them in a ‘married/un-married’ limbo, often referred to in legal terms as ‘limping marriages’. The law and what it requires of people in order to have a valid status is clear neither to those in the Muslim community in Britain and abroad nor to UK administrative authorities, support groups, legal practitioners and commentators.

WLUML has conducted a brief policy research project with the aim of beginning a dialogue on how to address the human rights violations being suffered by women in Muslim communities in Britain and South Asia in connection with the recognition of Muslim marriages and divorces in Britain. We believe this to be the first in-depth report of the issue to combine sociological, legal and political analysis.”